

# ARTICLE

## AMERICAN & BRITISH INSURERS AND COURTS AS AIDERS AND ABETTORS OF COMMERCIAL TERRORISM

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"We will spare no legal means to identify, locate and incapacitate terrorists and those who aid and abet them in their criminal activities."<sup>1</sup>

U.S. Attorney General John Ashcroft, ca. 2001

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1. Jules Crittenden, *War on Terrorism:: Arizona Man Indicted for Lying in Terror Probe*, BOSTON HERALD, Oct. 13, 2001, at P8, available at 2001 WL 3813541.

"If any persons shall . . . insure or contract [to insure] any slaves, . . . the persons [including] their aiders and abettors shall be . . . [imprisoned] for a term not exceeding fourteen years, or . . . confined . . . to hard labour [for at least] three years."<sup>2</sup>

British Parliament, ca. 1824

"[I]t shall be unlawful . . . to aid or assist in the carrying away . . . as slaves . . . inhabitants of Africa . . . All insurances . . . in respect to any . . . [slave] trading . . . shall be . . . unlawful."<sup>3</sup>

British Parliament, ca. 1807

"[N]o citizen . . . shall . . . trade or traffic in slaves . . . Every person [found] aiding or abetting . . . shall pay the sum of two thousand dollars."<sup>4</sup>

• U.S. Congress, ca. 1794

"Terror has existed in America for hundreds of years . . . and slaves quite frequently were killed even though they were innocent."<sup>5</sup>

• President William Jefferson Clinton, ca. 2001

## INTRODUCTION

Arguably, before the devastating September 11th attacks on the Pentagon and the World Trade Center,<sup>6</sup> few corporations, small-to-mid-size businesses, or governmental entities truly appreciated the need for terror-

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While the nation was riveted by the threat of anthrax attacks, federal investigators yesterday threw the book at a man who was questioned in the Sept. 11 terror attacks for lying to them. . . . 'This indictment serves as a reminder that the Department of Justice will bring the full weight of the law upon those who attempt to impede or hinder this investigation,' Ashcroft said. *Id.*

2. The Slave Trade Act, 1824, 5 Geo. 4, c. 113, § 10 (1824) (Eng.). See also Hargrove v. Underwriters at Lloyd's, London, 937 F. Supp. 595, 600 (S. D. Tex. 1996).

[T]he Colombia legislature passed the ANTI-ABDUCTION ACT, ACT 40 OF 1993. . . . Under the Act, any person who — 'knowing that money is going to be destined to pay a ransom for the release of an abducted individual, participates in the transaction thereof' — is considered to have aided and abetted the kidnapper and faces up to five years in prison. *Id.*

3. An Act for the Abolition of the Slave Trade, 1807, 47 Geo. 3, c. 36, §§ 3, 5.

4. Slave Trade Act of March 22, 1794, ch. 11, §§ 1, 2, 1 Stat. 347, 347-49 (prohibiting carrying on the slave trade from the United States to any foreign place or country).

5. Joseph Curl, *Clinton Calls Terror A U.S. Debt to Past: Cites Slavery in Georgetown Speech*, WASH. TIMES, Nov. 8, 2001, at A1, available at 2001 WL 4166154.

6. Michael Grunwald, *Terrorists Hijack 4 Airlines, Destroy World Trade Center, Hit Pentagon, Hundreds Dead, Bush Promises Retribution Military Put on Highest Alert*, WASH. POST, Sept. 12, 2001, at A1, available at 2001 WL 27731754.

There were no reliable estimates last night of how many people were killed in the most devastating terrorist operation in American history. The number was certainly in the hundreds and could be in the thousands. It was the most dramatic attack on American soil since Pearl Harbor . . . . The commandeered jets obliterated the World Trade Center's twin

ism insurance. Also, among those who purchased insurance, probably only a few could fully decipher the highly complex coverage and exclusion provisions appearing in their insurance contracts.<sup>7</sup>

Furthermore, before September 11th, perhaps an even smaller number of ordinary Americans knew that the terrorism insurance industry is huge, spanning both national and international markets. In fact, the industry has an exceedingly long history.<sup>8</sup> Also, average consumers probably did not know that property and casualty insurers — those who pitch terrorism insurance — make exceedingly large profits. For example, in 2001, Allstate made \$7.2 billion dollars.<sup>9</sup> In addition, Liberty Mutual<sup>10</sup> and Axa<sup>11</sup> — major American and French property and casualty insurers, respectively — earned collectively more than \$70 billion in profits.

Furthermore, several countries operate government- or state-backed insurance pools to cover various sorts of terrorism risks. Essentially, if

110-story towers . . . and ripped a blazing swath through the Defense Department's imposing five-sided fortress . . . . *Id.*

7. Without doubt, many commercial terrorism insurance contracts are highly complicated, requiring insureds as well as insurers to petition state and federal courts for declaratory relief. *See, e.g., Sherwin-Williams Co. v. Ins. Co. of Pa.*, 863 F.Supp. 542, 544-547 (N.D. Ohio), *aff'd*, 105 F.3d 258 (6th Cir. 1997) (outlining complicated coverage and exception clauses).

8. *Cf. Alan Cowell, Lloyd's Expects Claims From Attacks to Top \$1.9 Billion*, N.Y. Times, Sept. 27, 2001, at W1. "Lloyd's of London, the world's biggest insurance market, said . . . that it expected to face \$1.92 billion in claims . . . related to the [recent] terrorist attacks in the [U.S.], making it the most costly calamity in Lloyd's 320-year history." *Id.*

9. *See Allstate Reports 29% Jump in Profit For Fourth Quarter*, WALL ST. J., Feb. 8, 2001, at C11, available at 2001 WL-WSJ 2853711. "Allstate Corporation reported a 29% surge in fourth-quarter net income, citing the success of strategic initiatives to boost profitability in the company's core property casualty insurance business." *Id.* *See also* Christopher Oster, *Investigation and Mobilization: AIG Raises Loss Estimate From Attacks To Pretax \$800 Million, Plans Charge*, WALL ST. J., Oct. 10, 2001, at A6, available at 2001 WL-WSJ 2878061 (stating that "During the same period, AIG disclosed that it had a "net income of \$1.63 billion on revenue of \$12.58 billion . . . [and] \$50 billion in shareholder equity.").

10. *See* Christopher Oster, *Liberty Mutual Seeks to Alter Its Structure*, WALL ST. J., Sept. 18, 2000, at C15, available at 2000 WL-WSJ 26609980. "Liberty Mutual [is] one of the 10 largest property-and-casualty insurers in the U.S., with \$13.6 billion in revenue last year." *Id.*

11. *See* David I. Oyama, *World Watch ? Axa Reports Nine-Month Revenue Growth*, WALL ST. J., Nov. 14, 2001, at A17, available at 2001 WL-WSJ 29677829.

French insurer Axa said demand for new products and increased premiums helped it post higher revenue . . . . Revenue for the nine months [increased] 10% from a year earlier to 55.54 billion euros (\$49.7 billion), and was up 2.5% on a comparable basis. Revenue from life insurance and savings products jumped 6.4% to 35.14 billion euros. Revenue from property and casualty insurance, buoyed by rising premiums, rose 3.2% to 12.35 billion euros. *Id.*

insurers' or reinsurers'<sup>12</sup> resources are insufficient to cover losses, national governments step in to help. For example, England established a pool to help victims recover from Irish Republican Army attacks.<sup>13</sup> In 1954, Spain formally approved a state-backed pool, which "originated [after] the Spanish Civil War."<sup>14</sup> South Africa developed a terrorism pool in 1979 following the civil unrest in Soweto.<sup>15</sup> More recently, the United States established a very restrictive and temporary government-backed terrorism insurance pool.<sup>16</sup>

Although the majority of American insurance consumers probably do not understand the particulars of the terrorism-insurance industry, they arguably had some reasonable expectations before September 11th: 1) they reasonably expected insurance companies to process claims in a timely manner when victims presented claims; 2) insureds expected terrorism insurers to settle claims, pay proceeds and reimburse expenditures once insureds proved that "terrorism" caused their financial losses; and, 3) after settling a claim or compensating victims, consumers expected insurers to continue to sell terrorism insurance at an affordable price to cover future attacks and losses.

However, in the wake of September 11th, the American public, businesses and state governments have been forced to face several unexpected and disturbing developments. As reported above, terrorism insurers have made billions of dollars historically on an annualized ba-

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12. Oster, *supra* note 9, at A6 ("Insurers buy reinsurance to spread the risks of individual policies.").

13. See *Assuring The Insurers*, BUFFALO NEWS, Nov. 6, 2001, at B10, available at 2001 WL 6362837 (commenting that "Britain faced similar problems after Irish Republican Army radicals planted bombs in London. Its solution was a government-backed terrorism insurance pool."). See also *Commercial Terror Cover Will Not Quit*, INS. DAY, Aug 8, 2001, at 12 (stating that "Commercial terrorism insurers are determined to continue providing alternative cover to the UK's government-backed Pool Re scheme, despite last week's Ealing bomb. The blast in a busy suburban street is believed to have been the latest in a string of London attacks by the breakaway Real IRA group.").

14. See Carolyn Aldred, *Insurance Pools Untapped: Some Governments Guarantee Terrorism Coverage*, BUS. INS., Sept. 24, 2001, at 35. "Spain's state-backed Consorcio de Compensacion de Seguros originated as a result of the Spanish Civil War, which lasted from 1936 to 1939. Although operational since 1941, the Consorcio was formally recognized by Spanish law in 1954." *Id.*

15. *Id.* ("The South African Special Risks Insurance Association. was formed in 1979, in response to the 1976 riots in Soweto, a racially segregated township near Johannesburg, South Africa ").

16. See Donna Kato, *Airlines Offer Few Definitive Answers Checking With Carrier Advised As Schedules Change*, CHARLOTTE OBSERVER, Sept. 25, 2001, at 8A (recognizing that "President Bush has signed a bill giving U.S. airlines \$15 billion in cash and loan guarantees, as well as state-backed insurance against war and terrorism risk for the next six months.").

sis.<sup>17</sup> In fact, even after settling some of the September 11th claims,<sup>18</sup> insurers still made enormous profits.<sup>19</sup> Yet, as of this writing, a majority of property and casualty insurers intend to cancel commercial and residential terrorism insurance. According to the carriers: they cannot and will not continue to underwrite large and repeated losses, like those occurring at the World Trade Center.<sup>20</sup>

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17. See *Swiss Re Estimates Damage from Sept. 11 Totals \$90 Billion*, WALL ST. J., Dec. 21, 2001, at A13, available at 2001 WL-WSJ 29681330.

The Sept. 11 terrorist attacks caused almost as much physical damage as history's most damaging earthquake. . . . [There is] more than \$115 billion in losses from direct physical damage, according to a study by Zurich-based Swiss Reinsurance Co., the company with the largest exposure among the 22 [property and casualty] carriers that insured the World Trade Center . . . . Only the 1995 earthquake in Kobe, Japan, caused bigger damage — an estimated \$100 billion . . . . Even so, the bulk of the damage wasn't covered by insurance. Swiss Re estimates that [only] \$19 billion of the costs of property damage and business interruption caused by the terrorist attacks will be borne by the insurance industry. (emphasis added). *Id.*

18. See, e.g., *Nine Insurers to Avoid Lawsuits in Resolving Disputes Over Attack*, WALL ST. J., Dec. 12, 2001, at B6, available at 2001 WL-WSJ 29680265 (stating that "Nine major insurance companies have agreed to try to resolve any Sept. 11 terrorism coverage disputes . . . through negotiation or mediation . . . The principal aim is to avoid the cost and delay of lawsuits."); Jonathan D. Glater, *Insurance Battle Escalates*, N.Y. TIMES, Nov. 16, 2001, at B11 (noting "The World Trade Center's largest insurer said . . . a demand for an immediate payment [had been made]. . . . This dispute may eventually be decided in federal court . . ."); Jonathan D. Glater, *Trade Towers Leaseholder Sues Insurers*, N.Y. TIMES, Nov. 6, 2001, at B8 (noting that "Larry A Silverstein, the developer who won the lease [to] the trade center . . . sued Ace Bermuda Insurance [and] XL Insurance, two Bermuda companies that covered the complex."); and, *Insurers View Attack As Single Destruction*, NEWS-DAY, Nov. 27, 2001 at A13 (stating that "The Battery Park City Authority should not expect twice the insurance payout for damage sustained in the World Trade Center attacks . . . . [He] said the insurance industry regards the Sept. 11 attacks as one event — and he predicted that the courts would agree. The issue already is in federal court.").

19. See *Hartford Financial Services Group Inc.: Terror Claims of \$440 Million Blamed in \$103 Million Loss*, WALL ST. J., Oct. 30, 2001, at B5, available at 2001 WL-WSJ 29676323 (noting that, "Hartford Financial Services Group Inc., stung by \$440 million in claims stemming from the Sept. 11 terrorist attacks, reported a third-quarter net loss of \$103 million . . . . [But its revenues were] \$3.72 billion, down 1.8% from a year earlier." ). See also Oster, *supra* note 9, at A6.

AIG had second-quarter net income of \$1.63 billion on revenue of \$12.58 billion. He also said AIG was poised to take advantage of rising prices in the property-casualty insurance market, pointing to AIG's \$50 billion in shareholder equity. Mr. Greenberg said the \$800 million loss estimate related to the terrorist attacks was net of reinsurance . . . . AIG estimates its gross loss in the attacks at \$2 billion to \$2.1 billion. *Id.*

20. See, e.g., Steve Dwyer, *Dealing With Disasters: Terrorist Attack Exposes Risk*, in 5 INS. NETWORKING & DATA MGMT. 38 (December 2001) (noting that "Many insurers have stated that they will be unable to support repeated losses of such magnitude, and reinsurers indicate they may begin canceling commercial terrorism-risk coverage."); *United States House Backs Terror Aid Package for Insurers*, LLOYD'S LIST, Nov. 9, 2001, at 2. "US insurers say they can pay the expected [40 billion dollars] in claims but cannot support repeated

For a while, a few American insurers will continue to provide full terrorism coverage for low-profile<sup>21</sup> businesses and properties, but not for high-profile<sup>22</sup> residential and commercial properties.<sup>23</sup> A few others will provide some limited coverage,<sup>24</sup> although at exorbitant prices.<sup>25</sup> But these new realities, themselves, are increasingly terrorizing property owners and at an alarming rate. For example, some property owners — who cannot secure terrorism insurance — “are reluctant to speak out for fear of scaring tenants and drawing attention to themselves.”<sup>26</sup>

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losses of that magnitude, particularly as reinsurers are expected to cancel commercial terrorism-risk coverage from January 1, when most such contracts come up for renewal.” *Id.*

21. See Christopher Oster, *Terror-Insurance Costs Cut Into Demand*, WALL ST. J., Jan. 4, 2002, at A4, available at 2002 WL-WSJ 3382024. “Smaller, lower-profile businesses are less affected by the insurance industry’s retrenchment. They are generally still able to get terrorism coverage as part of a basic package, albeit at higher prices than they paid last year . . . .” *Id.*

22. See Peter Grant, *Market for Trophy Property Slows As Insurance Choices Start to Fall*, WALL ST. J., Jan. 11, 2002, at B8.

Terrorism insurance is proving most difficult to obtain for owners of high-profile properties that seem likely targets . . . . Companies that have acknowledged losing terrorism insurance include Brookfield Properties Corp., Toronto, which owns downtown skyscrapers in a number of major cities including New York. LCOR Inc., a developer based in Berwyn, Pa., lost terrorism coverage on the International Arrivals Terminal at JFK International Airport in New York, which it completed last year. *Id.*

23. See Oster, *supra* note 21, at A4. “Prior to the Sept. 11 attacks . . . such terrorism coverage was included as part of a standard policy. Now, terrorism coverage is being stripped out of the policies offered to most large businesses and owners of properties viewed by insurance companies as the likeliest targets, including tall office buildings, sports stadiums and shopping malls.” *Id.*

24. Oster, *supra* note 21, at A4.

Even those insurance buyers who are getting terrorism coverage are getting less of it . . . . The tougher environment for buyers results from a reluctance by the reinsurance sector, which takes on some of the risk underwritten by primary insurers, to continue assuming terrorism risks. The world’s biggest reinsurers announced after the Sept. 11 strikes that they would no longer assume such exposures. *Id.*

25. Shailagh Murray and John D. McKinnon, *Never Mind: What Killed Stimulus? Hints of a Recovery and Politics of 2002— Aftermath of Sept. 11 Attack Gives Way to Partisanship and Fears About Deficit*, WALL ST. J., Dec. 21, 2001, at A1, available at 2002 WL-WSJ 29681437. According to the Secretary of the Treasury, Mr. O’Neill: “Insurance premiums for people who had to do renewals for property and casualty since Sept. 11 have doubled and tripled . . . .” *Id.* Oster, *supra* note 21, A4. “‘There is terrorism coverage available, but it’s at outrageous prices,’ said Bob Spadaccia, senior vice president for the Northeast at USI Insurance Services Corp., a San Francisco insurance broker.” *Id.* Dwyer, *supra* note 20. “Even if carriers continue to offer such coverage, it’s a good bet that premiums will rise significantly . . . .” *Id.*

26. Grant, *supra* note 22, at B8 (The Real Estate Roundtable’s Senior Vice-president, Clifton Rodgers, Jr., stated, “We’re hearing it quietly expressed from people, but they won’t give us details.”).

Perhaps, the most terrifying development, from the public's point of view, is occurring in state legislatures. Since September 11th, American insurance companies have been petitioning states for permission to exclude terrorism coverage altogether. More specifically, insurers want to insert terrorism exclusion clauses into commercial-umbrella and general-liability contracts, two "wildly sold" products among small and midsize businesses, associations and organizations.<sup>27</sup>

Incredibly, state legislators and regulators have responded quickly and definitively. Just a few months after the attacks on the Pentagon and the World Trade Center, "the majority of states . . . granted terrorism exclusions . . . noting that, without the exclusions, insurers would be forced to take on large risks without the benefit of reinsurance."<sup>28</sup> Furthermore, the remaining state regulators have stressed that "they will follow suit unless Congress approves a federal backstop for terrorism insurance."<sup>29</sup>

Why do these political decisions terrorize the business community more than terrorism, itself? Corporations and owners of midsize operations worry about maintaining access to capital. From their perspectives, if they cannot secure terrorism insurance to cover potential losses, banks will be less willing to lend money.<sup>30</sup> Also, many fear that business environments will sour and capital markets will suffer profoundly<sup>31</sup> if states

27. Michael Schroeder and Christopher Oster, *Congress Fails to Pass Terror-Insurance Bill*, WALL ST. J., Dec. 21, 2001 at A2, available at 2001 WL-WSJ 29681438 ("Small and midsize businesses may soon begin complaining to their representatives in Washington . . . [I]nsurers have been pushing state insurance departments for permission to remove terrorism coverage from policies now protected by regulators.").

28. Christopher Oster and Michael Schroeder, *Workers' Comp Insurance Now Harder to Get*, WALL ST. J., Jan. 9, 2002, at A3, available at 2002 WL-WSJ 3382460 ("After Sept. 11, nearly all the world's major reinsurers, which typically assume some of the exposures underwritten by primary insurers, announced that they wouldn't provide coverage for terrorism.").

29. Christopher Oster, *States Approve Terrorism Curbs On Insurance*, WALL ST. J., Dec. 14, 2001, at C14, available at 2001 WL-WSJ 29680696.

State insurance regulators have begun to approve broad terrorism exclusions in commercial insurance policies . . . . The exclusions, which mostly apply to the small and midsize businesses generally covered by the regulators, have already been approved in South Dakota . . . . Exclusions on the larger commercial insurance policies, which generally aren't subject to state regulatory approval, have been put into effect since the Sept. 11 attacks. *Id.*

30. Schroeder and Oster, *supra* note 27, at A2 ("If businesses aren't covered for terrorism damage, one fear is that banks won't lend them money or might consider their loans in default.").

31. Helene Cooper, Robert Guy Matthews and Jacob M. Schlesinger, *Bailout Request Stirs Industrial-Policy Issue*, WALL ST. J., Dec. 6, 2001 at A2.

Within days of the terror attacks on the World Trade Center and the Pentagon, President Bush and aides quickly concluded that the airline industry was vital for the working of the U.S. economy, leading them to sign off quickly after the attacks on a \$15 billion bailout for



allow insurers to exclude terrorism coverage. Of course, some insurers argue that such apprehension is completely unfounded,<sup>32</sup> because international insurers, like Lloyd's of London,<sup>33</sup> will always offer terrorism coverage.<sup>34</sup> Consequently, sustained economic activity and prosperity will continue.

Such assurances ring hollow among supporters of and participants within other major social institutions. During the latter part of the twentieth century, the following "pillars of American society"<sup>35</sup> received the brunt of "terrorist attacks": abortion-clinics,<sup>36</sup> charities,<sup>37</sup> churches,<sup>38</sup>

that industry. Officials also have argued that the terrorism-insurance coverage is essential for American companies, and the possibility of such coverage drying up this year justifies federal involvement." *Id.*

Schroeder and Oster, *supra* note 27, at A2. "Terrorism coverage has been more readily available to small and midsize companies, partly because state regulations require that terrorism claims be covered in many types of policies. The same holds for homeowners' insurance." *Id.*

32. Holman W. Jenkins Jr., *Business World: Hurry Up, Washington, or Insurance May Fix Itself*, WALL ST. J., Dec. 5, 2001 at A21, available at 2001 WL-WSJ 29679842.

Some would have you believe that all real-estate lending and similar projects would come to a halt. Bankers would no longer be willing to lend, investors to invest, builders to build, because they would no longer be able to [transfer to] an insurance company the risk of potential loss from a terrorist attack. To buy this alarm, you would have to believe . . . against all evidence . . . that the U.S. economy would fold up and die because financiers and entrepreneurs are too weenie to find a way to proceed despite the absence of insurance for terrorism risk . . . . Not a likely scenario. *Id.*

33. Oyama, *supra* note 11, at A8.

British insurance market Lloyd's of London announced [that it is gearing] up to cash in on surging insurance rates . . . . Industry watchers interpreted the capacity increase as a vote of confidence by investors in the market. Lloyd's, the world's largest insurance market, estimates it will have to pay out GBP 1.9 billion (\$2.73 billion) — its largest-ever single loss — because of claims related to the Sept. 11 terrorist attacks in the U.S. . . *Id.*

34. Jenkins, *supra* note 32, at A21 ("Even Swiss Re, which [experienced the biggest loss] from the World Trade Center, has begun offering terrorism coverage on a 'very limited' basis.").

35. Cf. Edward Epstein, *It's Controversial and Influencing Clinton — The Politics of Communitarianism*, SAN FRANCISCO CHRON., Jan. 5, 1994, at A1, available at 1994 WL 4079013 ("[The] communitarian movement [is] a loose-knit coalition of people from a broad band of the political spectrum . . . . The movement is neither liberal nor conservative . . . . [T]he communitarians are bursting with ideas for rebuilding what they see as the pillars of American society — the family, the school and the community.").

36. See generally Oster, *supra* note 29, at C14 (stating that "The exclusions, spurred by the actions of largely unregulated reinsurers, initially met with resistance from state regulators. They said proposed exclusionary language would eliminate coverage for church and abortion-clinic bombings."); Peter Baker, *Gore Denounces Abortion Clinic Attacks — "We Will Not Let You Terrorize America's Women . . . We Will Find You,"* WASH. POST, Jan. 23, 1997, at A14, available at 1997 WL 2247685.

day-care centers,<sup>39</sup> hospitals,<sup>40</sup> mosques,<sup>41</sup> nuclear families,<sup>42</sup> syna-

37. Cf. Tracey Kaplan, *Fire Strikes at the Heart of Homebuilding Charity a Ruined Warehouse With No Insurance Devastates Group*, KANSAS CITY STAR, Apr. 18, 1995, at B1, available at 1995 WL 4156765.

Habitat for Humanity, the charity that helps put roofs over the heads of the poor, now needs a roof itself. Charred roof beams and blackened steel walls were all that remained . . . of its warehouse . . . after an arson fire . . . . The fire caused about \$45,000 damage, mainly to the 17 trusses that hold up the roof. The loss is particularly devastating to the group, which has built 89 houses for the poor in the past 16 years, because the warehouse was not covered by insurance. *Id.*

38. See, e.g., *Attacks on Churches Frustrate Black Leaders They Call for Action Against Domestic Terrorism*, ST. LOUIS POST DISPATCH, Mar. 29, 1996, at 7A, available at 1996 WL 2759885.

A preliminary report by the nonprofit group showed that 33 cases remain unsolved in the 45 attacks on black churches in the South since January 1990. Many of the churches, nearly all-small and in rural areas, have had trouble rebuilding after they were burned or heavily vandalized . . . . 'I remember when church bombing was a method used to terrorize us in the 1960s,' said the . . . chairman of Democratic Renewal's board. *Id.*

39. See generally Sue Anne Pressley, *Bomb Kills Dozens in Oklahoma Federal Building — More Than 200 Missing Children at Day Care Among Victims of Apparent Terrorist Attack*, WASH. POST, Apr. 20, 1995, at A1 (discussing terrorist bombings).

40. Cf. Matthew Cella, *Specter of Terrorism Looms Over ERs Hospitals— Upgrading Preparedness in the Event of Biological, Chemical Attack*, WASH. TIMES, Sept. 29, 2001, at C8, available at 2001 WL 4163038.

At the Georgetown University Medical Center . . . the emergency preparedness plan manager, said the hospital's contingency plan is being 'fine-tuned' in the wake of the [September 11th] attacks . . . . [T]he Washington center convened a task force in 1999 to address bioterrorism. The hospital created response scenarios for small, large or massive attacks, with priorities on identifying potential agents, assessing the threat of each and managing those who have been exposed. *Id.*

41. See generally Deborah Kong, *Anti-Arab Threats, Slurs, 1 Attack Reported— Windows of Dallas-Area Mosque Shot Out: Arab, Muslim Groups Fear Collective Blame For Terrorism*, BEACON J. (AKRON), Sept. 13, 2001, at A10 (discussing the assault on America); Laura Vozzella, *Maryland Muslims Brace Against Harassment Many Feel Threatened; Police Officer Stationed at Mosque*, BALT. SUN, Sept. 14, 2001, at 13A (noting that "From Chicago to Denton, Texas, mosques, Islamic community centers and Arab newspapers have been pelted with insults and explosives.").

42. Debbie Goldberg, *Prosecutor Says Sons Terrorized Their Family 2 Skinhead Teenagers Held in Deaths of Parents, Brother*, WASH. POST, Mar. 4, 1995, at A3, available at 1995 WL 2081453.

The older brothers became involved in the skinhead movement . . . . said Bob Steinberg, the Lehigh County district attorney. Large and hulking with shaved heads, Bryan and David Freeman stood out in a crowd even before they had the words 'Berzerker' and 'Seig Heil,' respectively, tattooed on their foreheads . . . . Their parents feared for their safety in recent years as their sons 'terrorized the family,' Steinberg said. 'The parents had rules, they had recently sold their (sons') car, thrown away neo-Nazi literature, and this all added to the disharmony within the family.' *Id.*;

Barbara Vobejda, *Allegations Focus National Attention on Society's Response to Spouse Abuse— 1,500 Women a Year Died of Domestic Violence in U.S. in 1980s*, WASH. POST,

gogues<sup>43</sup> and universities.<sup>44</sup> Their physical structures were repeatedly bombed,<sup>45</sup> torched<sup>46</sup> and defaced.<sup>47</sup> Their members were viciously intimidated,<sup>48</sup> physically assaulted<sup>49</sup> and murdered.<sup>50</sup> Therefore, it is easy to

Jun. 19, 1994, at A18 ("Domestic violence is common in this country. Estimates place the number of women beaten by boyfriends and husbands each year at 4 million.").

43. See, e.g., *FBI Ties 2 To Plot Of Racist Terror: Complaint Says Rap Stars, Synagogues Were Targeted*, SAN JOSE MERCURY NEWS, Jul 30, 1993, at 1A (noting that "[A]n alleged member of a white supremacist group called the American Front, confessed to [an] FBI Special Agent . . . that the planned mayhem included the bombing of synagogues and the assassinations of rap stars. Specific targets for 'political bombings' were Jewish synagogues [and] Jewish-related agencies . . .").

44. *University Bomber Gets Life in Prison Ex-Ohio Man Convicted of Terrorist Campaign at Florida A&M Last Year*, BEACON J. (AKRON), Sept. 16, 2000, at A3 ("A white man was sentenced yesterday to life in prison for setting off two pipe bombs that spread terror last year at the predominantly black Florida A&M University but caused no injuries."); *'Mad Scientist' Terrorizing New York Research University: Someone's Poisoned Coffee, Turned on Valves Releasing Deadly Gas, Set a Fire and Made Anonymous Death Threats*, LEDGER-ENQUIRER, July 27, 1994, at C5.

45. See, e.g., Dale Russakoff, *Church Bombing Trial Told of Accused's Racism — Former Girlfriend Says Blanton Terrorized Blacks*, WASH. POST, Apr. 27, 2001, at A13, available at 2001 WL 176239 (stating that "From across the decades, witnesses in the trial of former Ku Klux Klansman Thomas Blanton Jr., accused of murdering four black girls in the 1963 bombing of the 16th Street Baptist Church, told a state court jury how he boasted of wanting blacks to die and terrorized them routinely."); Jon Jeter, *Man May Have Killed Self in Garage Blast, Police Say Officer at Door to Ask About Church Bombing*, WASH. POST, May 30, 1998, at A2. "Local, state and federal officials had compiled a list of nearly 350 people to interview in connection with Sunday's bombing, which ripped a 10-by-15-foot hole in a wall of the First Assembly of God Church during morning services." *Id.*

46. Marc Kaufman, *FBI Probes Oregon, University Lab Arsons, Blazes Targeted Tree Genetics Experiments— Environmental Terrorism Suspected*, WASH. POST, May 24, 2001, at A17.

Both sites have been associated with the genetic modification of trees, which has become an emotional target of protest and attack by radical environmentalists. An agency official in Seattle said that the university fire . . . is being investigated by the Puget Sound Joint Terrorist Task Force, a federal, state and local effort. [T]he Oregon attack is also being probed by the FBI as an act of terrorism . . . . *Id.*;

Linda Kanamine, *'Unmistakable' Terrorism in Arson at Tennessee Church*, USA TODAY, Jan. 12, 1996, at 3A, available at 1196 WL 2042919 ("Federal investigators aren't ready to call the firebombing of a Knoxville, Tenn., church racially motivated, despite racial slurs found in the rubble. 'This was an arson, without doubt,' said the FBI [agent] . . . . Whatever the motive, 'this is an unmistakable act of terrorism,' says Brian Levin of the Southern Poverty Law Center.").

47. See, e.g., *Hate Graffiti Sprayed at Synagogue in Bethesda Vandalism Preceded Building's Dedication*, WASH. POST, Apr. 2, 2001, at B1, available at 2001 WL 17617685. "The graffiti was sprayed on the pavement that leads to the parking lot of Adat Shalom Reconstructionist Congregation, a synagogue that was the subject of a long-standing zoning dispute among residents of the Carderock Springs enclave in Bethesda." *Id.*

48. See, e.g., Editorial, *Hateful Crime Deserves More Time*, ATLANTA J. CONST., Feb. 24, 2000, at A22, available at 2000 WL 5442902. "Georgia's proposed Anti-Domestic Terrorism Act assigns extra jail time for hate crimes inspired by a victim's race, religion or

understand why these segments of society are concerned about losing terrorism coverage.

Very likely, displeased consumers and politicians will try to reverse insurance regulators' hasty decisions, and agitate to thwart additional plans to terminate terrorism insurance. Because long before the attack on the World Trade Center and before insurers' decision to eliminate terrorism coverage, choruses of consumers were uttering some extremely malicious things about the insurance industry in general, and about specific insurers in particular.

First, critics asserted that state insurance regulators aided and abetted insurers' anti-consumer practices, by helping companies to victimize vulnerable policyholders. Some insureds, for example, adopted views like this one: "[The] laws of our supposedly free and fine country are [essentially] designed to aid and abet . . . the insurance industry['s] [outright thievery]."<sup>51</sup> Others maintained: "[Specific companies use] fraud investigation[s]. . . to terrorize people . . . and corrupt officials to aid and abet their scheme."<sup>52</sup> Still others suggested: "Aiding and abetting is the Fed-

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sexual orientation . . . . As a nation, we have a right and an obligation to speak forcefully against crimes of terror designed to deliver a message of hatred and intimidation to an entire class of people, whether gays, Christians or blacks." *Id.*

49. See, e.g., Stephen Barr, *Serial Bombs Feared After Atlanta Blast Attack at Gay Club Similar to Explosions at Clinic, Olympics*, WASH. POST, Feb. 23, 1997, at A1, available at 1197 WL 9336284.

A bomb exploded . . . at a nightclub here popular with gay men and lesbians in an attack that officials said is strikingly similar to one against a suburban abortion clinic . . . . Law enforcement officials familiar with both [the] attack and the abortion clinic assault last month said there were chilling similarities in both the devices and the circumstances of the terrorist attacks. *Id.*

50. See, e.g., Editorial, *Abortion Clinic Killers: Terrorists, Not Saviors*, USA TODAY, Jan. 3, 1995, at 12A, available at 1995 WL 2919085. "The truth is that abortion is legal; the painful, awful choice of whether to have an abortion rests with each woman, not with those who would kill in the name of preventing killing or with their supporters. The truth is that such people are terrorists deserving only public fury and scorn." *Id.*

51. *Medical Whores and the IME — Yes Virginia, There are Medical Whores. Report Them!*, at <http://graham.main.nc.us/~bhammel/mwhore.html> (last visited Jan. 12, 2004).

If you are sent, by an insurance company, to an 'Independent Medical Evaluation' (IME) — that's what they call it — nine times out of ten you will be sent to one of the insurance company's medical whores . . . . The insurance scam is that your state essentially puts a gun to your head, forcing you to purchase (specifically automobile) insurance policies. The insurance companies then collect the payments but then try to find every way, legal or illegal, . . . not to pay you in the event of an accident. It used to be called 'highway robbery . . . . ' [Now] in doublethink, it's called insurance, an oxymoron . . . if there ever was one. *Id.*

52. Judy Morris, MD, *Criminality at Bureaucratic Discretion — DA Rejects Patently Criminal Charges*, at <http://graham.main.nc.us/~bhammel/INS/DA.html> (last visited Jan. 12, 2004).

eral Justice System . . . [H]ow many would guess that the government would aid and abet corporate interests in delaying response to insurance victim's pleas. . . . We have seen the California [Department of Insurance] take a non-enforcement policy against certain insurers . . . . There is a growing trend of collusion between our government representatives and criminal corporations. What possible solution is there but to protest and protest loudly?"<sup>53</sup>

But the insured and their congressional allies lobbied the most ferocious and vociferous attacks against specific property and casualty insurers, and private managed-care<sup>54</sup> companies. Among other accusations, citizens asserted that these insurers terrorized the citizenry,<sup>55</sup> by putting corporate interests and greed above patients' and consumers' reasonable expectations and medical concerns. In fact, some critics called property

Since I filed my disability claims with UNUM, I have lived in almost constant fear. I have been pursued in my car, had my privacy invaded, had my credit checked for unapproved purposes . . . and then had these false impressions sent to my former employer. The Department of Insurance has published false statements about me and then, knowing they were false, sent them to my elected officials. *Id.*

53. Cf. Repeating Patterns — A Clearinghouse for Recording the Corruption of All-state Insurance Company: Delaying Justice is Decaying Justice, at <http://www.crowman.com> (last visited Jan. 28, 2004).

54. Cf. Laurie McGinley, *Hospitals Feel Sting of Cuts From Insurers*, WALL ST. J., Mar. 16, 2000, at B2, available at 2000 WL-WSJ 3021873.

Hospitals' financial performance deteriorated sharply last year, largely reflecting reduced reimbursements from private insurers, according to a new study to be released today by a congressional advisory group . . . . [M]ost of the decline resulted from cutbacks in payments from managed-care companies and other private payers, which are pressing hard to hold down health costs. *Id.*

55. See, e.g., Barry L Duncan & Scott D Miller, *The Heroic Client: Doing Client-Directed, Outcome-Informed Therapy*, at <http://www.mcfadz.fsnet.co.uk/therapy/reviews.htm#heroic> (last visited Jan. 28, 2004).

We sound the alarm bells and put a call out to therapists and consumers to question mental health authority . . . . Our vision of this alternative embraces change that is client directed, not theory driven, subscribes to a relational rather than a medical model, and is committed to successful outcome instead of competent service delivery. . . . [T]here are clearly many lessons which can be learned in Europe from the American experience of managed care: a monster made in the field's own image — a hodge-podge of empirically dead practices pieced together and now running amuck and terrorizing the citizenry. *Id.*

See also M.E. Victoria Association, *Self Help Group for People with Chronic Fatigue Syndrome*, at <http://members.shaw.ca/me.victoria/newsletters/99jul-aug.html> (last visited Jan. 25, 2004).

Do any of the 'insurance people' composing report forms, or handling them, or assessing them . . . really know the agony of ME/CFS, or how terrifying, frustrating, demoralizing and humiliating it is for a previously competent, intelligent and active individual to try and obtain a diagnosis and then have to beg for money? Do the top brass of insurance companies know just how terrorizing and harassing their communications can be to a very sick individual? *Id.*

and casualty insurers' practices "economic terrorism."<sup>56</sup> Others labeled insurers' behaviors "commercial terrorism for profit."<sup>57</sup>

As an illustration, thousands of physicians and health-care providers treat millions of Medicare and Medicaid patients each year. Consequently, the Center for Medicare and Medicaid Service Administration (CMS)<sup>58</sup> receives millions of claims from all sorts of providers. CMS hires insurance contractors — private insurance companies — to process the claims, investigate fraud, and perform other duties.<sup>59</sup> Quite recently, members of Congress criticized CMS's contractors harshly for "terrorizing" physicians and other providers. To help address those concerns, CMS reported that it would implement a new initiative entitled, "End the Terror."<sup>60</sup>

56. Arthur Gottschalk, *Corporate Insecurity Info-Terrorism is Emerging as a Threat to Business and Civil Networks. But Smart Companies will be Ready for the New Logic Bombs and Self-Replicating Worms*, ST. PAUL PIONEER PRESS, Aug. 10, 1996, at 1C ("The definition of terrorism is also widening to include so-called economic terrorism. Besides violence . . . economic terrorism can include everything . . .")

57. Cf. *2 Ex-Hostages Sue Iran for \$600 Million*, L.A. TIMES, Oct. 15, 1992, at A16, available at 1992 WL 2851861. "Former hostages Joseph Cicippio and David Jacobsen sued Iran on Wednesday for \$600 million . . . 'Iran was guilty of 'commercial terrorism for profit' lawyer James J. Oliver said." *Id.* See also *Law Targeting Animal Rights Protests Nullified*, L.A. TIMES, Oct. 12, 2001, at A30, available at 2001 WL 28919891. "In Salt Lake City, U.S. District Judge Bruce Jenkins struck down the state's Commercial Terrorism law, a statute that targeted animal rights protests, as overly broad and unconstitutional." *Id.*

58. See, e.g., Amy Goldstein, *HMOs Expected to Drop More Medicare Patients Administration Seeks Looser Rules on Managed Care*, WASH. POST, Aug. 30, 2001, at A27, available at 2001 WL 23190266. "The head of the federal agency that runs Medicare predicted yesterday that 'several hundred thousand' elderly Americans will be dropped from private health plans . . . Thomas A. Scully, administrator of the Centers for Medicare and Medicaid Services, said: 'we have done everything but the kitchen sink to keep them in.'" *Id.*

59. Janice Stanfield, *Legislative News — Initiatives to Improve Medicare Contractor Operations*, at <http://www.wocn.org/legislative> (last visited Jan. 12, 2004).

[T]he Centers for Medicare & Medicaid services Administrator, Thomas A. Scully . . . announced several more initiatives designed to improve Medicare Contractor Operations. Scully told the House Small Business Committee that CMS is taking steps to improve the quality of the telephone call centers operated by contractors, which received 24 million calls in 2000. The centers provide billing and other information to physicians and other providers. Medicare contractors are private insurance companies . . . *Id.*

60. *Id.*

Scully made his comments as members of the committee harshly criticized contractors, claiming they make life unnecessarily difficult and complicated for Medicare providers . . . Scully also announced that CMS this fall would unveil a new nursing home quality initiative. 'End the Terror.' 'Terrorizing by these contractors has got to end,' committee Chairman Donald A. Manzullo (R. Ill.) said, adding that he would keep referring to CMS as the Health Care Financing Administration until he was convinced the agency had become more responsive to providers and beneficiaries . . . Donna M. Christian Christensen (D.V.I.), who is a physician, said the burden associated with contractors is causing many

Additionally, before September 11th, policyholders confronted Allstate and accused the insurer of terrorizing women as a way to insure large profits. Some critics even described the practice as “Allstate’s War on Women.”<sup>61</sup> According to complainants, Allstate used “intrusive surveillance” and other tactics to defeat insured women’s right to receive fair compensation after experiencing physical and financial losses. Those same critics also claimed that Allstate terrorized minorities and low-income persons when those policyholders filed legitimate claims with the insurer.<sup>62</sup>

To be sure, the charges against Allstate have been extremely severe. During the 1990’s, consumers and politicians advanced substantial charges against a number of major, well-known insurers.<sup>63</sup> Complainants alleged that a variety of insurance companies— automobile, disability, homeowners, health, life, and property and casualty underwriters<sup>64</sup> — aided and abetted “domestic terrorism.” Who were the terrorists? They

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doctors to leave Medicare. Providers ‘want these carriers out of their lives,’ she said, calling for a moratorium on provider investigations. *Id.*

61. See INSURER CRIME OUTLINE, at [http://graham.main.nc.us/~bhammel/INS/CA\\_Senate/ico061700](http://graham.main.nc.us/~bhammel/INS/CA_Senate/ico061700) (last visited Jan. 12, 2004). “Allstate is also famous for terrorizing women with intrusive surveillance, so . . . they [can] quit their claim — Allstate’s war on women.” *Id.* See also *Allstate Insurance Sucks.com*, (searching for the word “terror” within this complaint archive provides another look at just how Allstate is terrorizing women) at [http://www.allstateinsurancesucks.com/View\\_Complaints\\_Jul\\_Aug\\_Sept\\_2001.htm](http://www.allstateinsurancesucks.com/View_Complaints_Jul_Aug_Sept_2001.htm) (last visited Jan. 12, 2004).

62. INSURER CRIME OUTLINE, June 17, 2000, at [http://graham.main.nc.us/~bhammel/INS/CA\\_Senate/ico061700](http://graham.main.nc.us/~bhammel/INS/CA_Senate/ico061700) (last visited Jan. 12, 2004). “Allstate ‘targets’ those least able to fight back with profiling programs such as COLOSSUS. This includes low-income, the undereducated, minorities, widows, and women in general, who are programmatically weighted for ‘lowballing’ or denial.” *Id.*

63. See, e.g., *Abused Lose Insurance, Panel Told*, PHOENIX GAZETTE, Mar. 15, 1995, at A16 (stating that “[a]fter various cases became public, State Farm Insurance [decided to sell] life insurance to women who still lived with a past abuser”); Fern Shen, *For the Battered Spouse, Insurers’ Bias Worsens Pain*, WASH. POST, Mar. 9, 1995, at A1. “In the case of the Pennsylvania woman who was hit by a shoe, Nationwide Insurance Co. turned her down after citing medical records that showed her husband broke her nose . . . [A]nother Pennsylvania woman was denied life, health and mortgage insurance by State Farm Insurance and life insurance by First Colony.” *Id.*

64. Cf. Andy Miller, *Effort to Outlaw ‘Pinklining’ by Insurers Gains Steam Bill Aims to Help Victims of Domestic Abuse*, ATLANTA J. CONST., Mar. 12, 2000, at D1. “The Georgia bill would make it illegal for an insurer to refuse, cancel or restrict coverage, raise a premium or refuse a claim because someone is a victim of domestic violence . . . The law extends to life, health, disability, and property and casualty insurance, including homeowners and automobile.” *Id.* Maggie Sieger, *SCC Backs Abuse Victim Law*, ALBUQUERQUE J., Oct. 2, 1996, at D5. “The legislation would cover health, life, disability, property and casualty insurance . . . Testimony during the hearing also revealed that domestic violence shelters often are denied property, casualty and automobile liability insurance coverage.” *Id.*

were husbands and boyfriends who terrorized and murdered millions of wives and girlfriends each year.<sup>65</sup> The evidence for that chilling assertion appeared in a 1988 survey of sixteen insurance companies.<sup>66</sup>

In the survey, half of the insurers admitted that they intentionally refused to issue or renew insurance contracts if the applicants were battered women. More disquieting, subsequent surveys revealed that even larger percentages of insurers victimized women in different ways. How? Underwriters purposefully allowed the presence or absence of domestic violence in one's life to influence a variety of underwriting decisions.<sup>67</sup>

65. According to conservative estimates, intimate partners are significantly more likely to terrorize American women than strangers or foreign terrorists. Each year, husbands and lovers attack at least 1.8 million women and about 1,400 women die from those violent attacks. See Editorial, *Don't Let Insurers Cancel — Some Companies Compound Abuse*, DAYTON DAILY NEWS, May 31, 1997, at 10A (stating that "[p]hysical assault by an intimate is the leading cause of injury to American women"); Beth Warren, *Domestic Violence: Family Disputes Turn Deadly Domestic-Related Killings Rose Dramatically Last Year*, ATLANTA J. CONST., Feb.18, 2001, at JJ1. "Domestic violence accounted for 70 percent of [Gwinnett County's] homicides last year — compared with 25 percent the previous year . . . . Statewide, residents made an estimated 50,000 calls to domestic violence crisis lines in 1999, according to the Georgia Department of Human Resources." *Id.* Dave Ghose, *Jews Acknowledge Domestic Violence— Author Brings Home Reality that Abuse Exists in Jewish Community*, BEACON J. (AKRON), Feb. 26, 2001, at B3.

Elaine Weiss followed all the rules . . . . But Weiss soon learned that the formula she . . . followed in seeking the right mate was far from perfect . . . . [She is] a domestic violence survivor . . . . Few people identify domestic violence as a problem among Jewish families. But statistics paint a different picture. Jewish women are abused at the same rate as women in the general population, and the rate of abuse is the same among Orthodox, Conservative and Reform Jews, according to Jewish Women International . . . . *Id.*

66. See, e.g., Katharine Q. Seelye, *Insurers Reject Battered Women: Legislation Against Practice Sought*, N. Y. TIMES, May 12, 1994, at A2, available at 1994 WL 8650542.

After being beaten up by her husband and shoved across the room, a Pennsylvania woman in her mid-20s sought life, health and mortgage disability insurance from State Farm Insurance last year. She was denied all three . . . . Aides to [Rep. Charles Schumer, D-N.Y.] said a survey of 16 insurance companies found that eight 'admitted to discriminating against victims of domestic violence.' *Id.*

See also Fern Shen, *For the Battered Spouse, Insurers' Bias Worsens Pain*, WASH. POST, Mar. 9, 1995, at A1 (stating that "[in 1994,] a congressional survey found that half of the largest insurance companies would refuse to cover a woman who had a history of being a battered spouse"); Deborah S. Hellman, *Is Actuarially Fair Insurance Pricing Actually Fair? — A Case Study in Insuring Battered Women*, 32 HARV. C.R.-C.L. L. REV. 355, 356, n5 (1997);

67. Miller, *supra* note 64, at D1.

Surveys [conducted] by insurance commissioners in Kansas and Pennsylvania . . . found that 24 percent of insurance companies admitted to using domestic violence as a factor when deciding whether to issue or renew a policy. The surveys showed more than half of health insurers and about two-thirds of life insurers use domestic violence as a factor in underwriting, the process that analyzes claims experience and general risk in order to determine a policy's cost. *Id.*



Assuredly, those horrific findings produced widespread anger, and helped to solidify the common view: husbands and boyfriends terrorized women first. Then, American and international insurance companies terrorize women again.<sup>68</sup>

Quite possibly, the perception that insurers aid and abet<sup>69</sup> domestic

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68. Editorial, *Stop Bias Against Battered Women 2000 Georgia Legislature*, ATLANTA J. CONST., Mar.16, 2000, at A22. "Incredible as it seems, many insurers have taken the position that victims of domestic abuse were to blame for 'risky lifestyles' . . . . The legislation, as it stands, will do essentially what the governor promised: keep insurance companies from making victims of domestic-violence victims a second time by canceling, limiting or denying coverage." *Id.* Miller, *supra* note 64, at D1. According to Gov. Roy Barnes, "for years, insurance companies have made victims of domestic violence into victims a second time by canceling, limiting or denying them insurance coverage." *Id.* Laura Gatland, *Domestic-Abuse Victims Want Help from Insurance Industry — Illinois Considers Law to Protect Victims of Domestic Violence, but is it Enough?* CHRISTIAN SCIENCE MONITOR, Jun. 5, 1998, at 3. "Washington State Insurance Commissioner [observed:] 'what's so ironic . . . is that you tell victims to report the violence (to authorities) and to tell the doctor . . . . But when [that information] appears in her records and she tries to get her life back together, she's victimized again.'" *Id.* Editorial, *Don't Let Insurers Cancel Don't Let Insurers Cancel*, *supra* note 65, at 10A. "Being in the business of calculating risk for profit, many insurance companies routinely use domestic violence as an underwriting criterion or as a rationale to cancel life-insurance policies or deny claims. That practice is wrong. It further victimizes women trying to recover from domestic attacks." *Id.* *Abused Lose Insurance*, *supra* note 63, at A16. "An abusive husband struck Jody in the face with a soda can and a shoe in separate 1990 attacks. Four years later she received another blow: Her insurance company denied her a life insurance policy. It had found out about the past abuse through medical records." *Id.* Shen, *supra* note 66, at A1. "What do sky divers, travelers entering war zones and battered spouses have in common? Many insurance companies refuse to cover them, insisting that they have chosen high-risk lifestyles that make them potentially too costly to insure . . . . 'I'm basically being punished because I'm the victim of a crime,' [according to a woman, who secured] insurance . . . after she contacted advocates for battered women and a lawyer." *Id.* Seelye, *supra* note 66, at A2. "[A] senior staff lawyer with the National Organization for Women's Legal Defense and Education Fund [observed:] 'By punishing women for having a history of domestic violence in their medical records, the insurance companies are discouraging women from disclosing abuse.'" *Id.* See Editorial, *Don't Deny Insurance to Victims of Abuse*, ALBUQUERQUE J., June 2, 1996, at A10 (stating that "victims of domestic abuse are twice victimized in New Mexico: first by the perpetrators of their abuse and second by a law that allows health insurers to deny coverage to victims of domestic abuse").

69. Editorial, *Don't Let Insurers Cancel Don't Let Insurers Cancel*, *supra* note 65, at 10A. "By categorizing domestic violence as a deliberate vice, on the order of smoking or drinking, insurance companies routinely have violated women . . . [who have been] terrorized by those closest to them." *Id.* See Editorial, *Don't Deny Insurance to Victims of Abuse*, *supra* note 68, at A10. "Knowing that they could lose their health benefits or even be denied future coverage only adds to the victimization [and] furthering inhibiting [terrorized women] from seeking help." *Id.* See also Shen, *supra* note 66, at A1 (noting that insurers refusal to insure abused victims will discourage terrorized women from "reporting abuse, leaving their abuser and seeking treatment"); Seelye, *supra* note 66, at A2 (noting

terrorism will continue. As of this writing, forty per cent of the states<sup>70</sup> still permit insurance companies to discriminate against terrorized women. Furthermore, in light of insurers' recent decision to terminate terrorism insurance, an even greater percentage of the public will likely embrace the view that carriers aid and abet terrorists. But there is more. In post-September 11th America, it is highly probable that insurance consumers and their supporters will promote an even more disconcerting position: federal and state courts aid and abet terrorism indirectly, by helping insurance companies to discriminate against terrorized individuals, businesses and social institutions.<sup>71</sup>

Is there credible evidence to support this latter assertion? Presently, many citizens firmly believe that federal and state civil-court judges are 1) corrupt,<sup>72</sup> 2) inherently biased in favor of one group over another,<sup>73</sup> and

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that insurers who make insurance policies "unavailable or more expensive . . . [are also] making it harder for women to leave the abuser").

70. See Editorial, *Stop Bias Against Battered Women 2000 Georgia Legislature*, *supra* note 68, at A22 (noting that "thirty-one states [60%] have already enacted laws to ban pinklining — [insurance discrimination against victims of domestic violence]"); Gatland, *supra* note 68, at 3. "At least 30 states [60%] have passed laws recently, after hearing of women . . . [who were] denied insurance or . . . [were] charged higher rates because their husbands abused them."). See also Editorial, *Don't Deny Insurance to Victims of Abuse*, *supra* note 68, at A10. "In an unscientific survey of health and life insurance underwriters in New Mexico, it was recently discovered that many companies routinely deny coverage to [battered spouses] . . . Some insurance companies have stopped the practice, but it is unlikely that all competitors in an industry that is fundamentally profit driven will stop voluntarily." *Id.*; see Hellman, *supra* note 66, at nn. 7-9, 17 (listing enacted state statutes, and proposed state and federal legislation to prevent insurance companies from victimizing battered women).

71. Cf. *Allstate's Patterns of Deceit — Repeating Patterns*, A CLEARINGHOUSE FOR RECORDING THE CORRUPTION OF ALLSTATE INSURANCE COMPANY, <http://www.crowman.com> (last visited on Mar. 6, 2002).

Did you know a corporation could place you under house arrest? Aiding and abetting is [an attribute of] the Federal Justice System. [Courts] delay insurance cases that are dangerous to the insurers. We all knew about insurance companies tactics to stall and delay claims. But, how many would guess that the government would aid and abet corporate interests in delaying response to insurance victims pleas. *Id.*

72. See, e.g., Joseph Perkins, *In League With Lawyers*, ATLANTA CONST., May 24, 1995, at A13.

Every year, another 18 million civil suits are added to state and federal court dockets. . . The reason so many Americans have become sue-happy is because they view the courtrooms as casinos. . . This lust for lucre has had a corrupting effect on America's civil justice system. Courtrooms are no longer sanctums of justice. They are simply venues where money changes hands between litigants, where justice frequently is sacrificed on the altar of avarice. *Id.*

Brian Flanigan, Joe Swickard And Bill McGraw, *Feds Probe Detroit Courts*, DETROIT FREE PRESS, Jan. 15, 1987, at 1A (noting that "Federal authorities are investigating allegations of bribery and corruption in Detroit's . . . civil courts. . . The undercover FBI opera-

3) very inclined to allow personal biases and extra-legal factors to influence procedural rulings, opinions and declarations.<sup>74</sup> In fact, some judicial watchers stress that the legal community should lobby for more procedural safeguards to deter judicial bias and some judges' propensity to allow immaterial factors to generate highly unprincipled, strained and predetermined declarations.<sup>75</sup> But more pertinently, many in the legal community firmly believe that some judges' questionable and arbitrary rulings help insurance companies to defeat insureds' reasonable expecta-

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tion . . . is focused on judges who allegedly have accepted cash in exchange for favorable rulings. . . .").

73. See, e.g., Sandra Torry, *Bias Survey Shows Unequal Courtroom Tendencies—Presidential What?* WASH. POST, Feb. 13, 1995, at F7.

A common and striking theme, the committee found, was the stark difference in the way white and minority attorneys view the court system. This came through loudly in the committee's survey of attorneys who practice at the court. White lawyers who responded generally 'believed that little bias affected proceedings' in the federal courts, while a 'much higher percentage' of minority lawyers 'perceived significant bias in the system,' according to the report. *Id.*

74. See, e.g., Louis B. Cej, *Biases Play Big Role, Writer Says*, RICHMOND TIMES-DISPATCH, Aug. 1, 1999, at F4 (reviewing Mary Frances Berry's *THE PIG FARMER'S DAUGHTER AND OTHER TALES OF AMERICAN JUSTICE: EPISODES OF RACISM AND SEXISM IN THE COURTS FROM 1865 TO THE PRESENT*. "According to the . . . head of the United States Commission on Civil Rights and a professor of American Thought at the University of Pennsylvania, race, class, and gender biases determine the decisions handed down by judges. Rather than objectively and impartially reviewing the facts, . . . judges systematically make rulings that favor white males."). See also Willy E. Rice, *Judicial Bias, The Insurance Industry and Consumer Protection—An Empirical Analysis of State Supreme Courts' Breach-of-Contract, Bad-Faith, Covenant-of-Good-Faith and Excess-Judgment Decisions, 1900-1991*, 41 CATH. U.L. REV. 325, 340-352 (1992) (documenting courts' inconsistent application of settled principles of law).

75. See *A Reasonable Judicial Precaution*, WASH. POST, Jul. 1, 1997, at A18. Comments of Rep. Charles T. Canady, (R-Tex.) stating, As the author of legislation that would allow peremptory challenges of federal judges, . . . [I should add that] 17 states have judicial peremptory challenge procedures that have been in operation in some states for more than a century. While seldom used, the threat of a challenge serves to deter judicial bias and provides an added level of assurance that the parties will receive a fair and impartial consideration of their case. . . . [Arguably] judicial peremptory challenges provide an additional safeguard against racial and gender-based bias. *Id.*

See also Willy E. Rice, *Insurance Contracts and Judicial Discord Over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal- and State-Court Declaratory Judgments—1900-1997*, 47 AM. U. L. REV. 1131, 1194-1214 (1998) (establishing conclusively that judges allow impermissible and immaterial factors to influence their rulings and declarations).

tions<sup>76</sup> of timely and appropriate relief under insurance contracts generally and under terrorism contracts in particular.<sup>77</sup>

Consider, for example, the case of *National Union Fire Ins. Co. of Pittsburgh v. Port Authority of New*.<sup>78</sup> In 1993, terrorists bombed the World Trade Center and generated millions of dollars in losses.<sup>79</sup> As the lessor-manager of the trade center, the Port Authority cited the indemnification provision in the lease-management agreement, and asked the tenants to reimburse the Authority for the cost of settling third-party claims.<sup>80</sup> National Union Fire and other insurers intervened on behalf of their tenant-insureds, instructed them not to indemnify and asked a court for declaratory relief.

On its face, the language in the indemnification clause was extremely broad: "[Tenants will] indemnify [the] Port Authority and hold it harm-

76. Cf. Sandra Fleishman, *How a Fire Can Turn Your World Upside Down In Picking Up the Pieces— Road to Settlement Can Be Long*, WASH. POST, Mar. 2, 2002, at H1.

How quickly and how willingly insurers respond to claims determines how fast a family can get back to business. Insurers say homeowners frequently do not have reasonable expectations about how much money they can get because they do not read, understand or update their policies. The insurers say their goal is to be fair and prevent fraud. At the same time, some consumer groups say insurers are dragging their feet more often and demanding more documentation than ever. *Id.*

77. Cf. Erik Ingram, *Consumer Lawyers Accuse A Judge Insurance Hearings Are Unfair, They Say*, SAN FRAN. CHRON., Apr. 4, 1990, at A6.

Lawyers for a coalition of consumer groups accused an administrative law judge . . . of issuing 'improper, highly unorthodox and arbitrary rulings' that favor the insurance industry . . . [The] attorneys for Public Advocates . . . made [the accusation] both orally and in a legal document, prompting . . . [the judge to say that his] rulings were shaped by law, not bias. . . *Id.*

See also *Allstate's Patterns of Deceit*, *supra* note 71.

If you have not experienced a problem with an insurance company or HMO, you probably know of someone who has . . . . We are besieged with corporate attacks . . . and no one is even recognizing the crimes. Government mandates by law [that] you must have insurance. Yet, they do little to enforce these policies when claims occur. The medias are silent. The government is silent. The insurers are certainly silent. And, the only cries you hear are the few victims' pleas for justice. Let us in the courts to plead our cases. Let us have . . . American Government! *Id.*

78. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. The Port Auth. of N.Y. and N.J.*, 261 A.D.2d 259, 690 N.Y.S.2d 260, N. Y. Slip Op. 04686 (1999).

79. See Douglas Feiden, *Port Authority and Insurers Sue for 450 Million*, Daily News (N.Y.), Mar. 22, 1996, at 38 ("After the bombing, the PA collected about \$ 510 million from its insurers, and now those companies are trying to get the money back through the suit.").

80. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 261 A.D.2d at 259 (After terrorists bombed the World Trade Center on February 26, 1993, some 28 third-party victims file personal injury claims against the Port Authority. Those persons — at the time of the bombing— were on premises that Inhilco and Hilton International leased and/or managed at the World Trade Center.).

less, 'from all claims and demands of third persons including but not limited to those for death, personal injuries, or for property damages arising out of the use or occupancy' of the [tenant's] premises."<sup>81</sup> One can reasonably assume that the parties to the contract — along with their talented lawyers — knew exactly what they were bargaining for when they inserted such broad language into the agreement. Nevertheless, the trial judge decided in favor of the insurance company and their insureds. Why?

In an extremely short memorandum decision, the judge simply stated that the third-party claims and payments — for which the Authority sought reimbursement— did not arise from the tenants' use or occupancy of premises in the World Trade Center. Instead, a bomb — over which the tenants exercised no control — caused the third-party injuries.<sup>82</sup> This declaration is disconcerting, because the court simply stated a conclusion without conducting a thorough analysis of the legal issues. There is a rich arsenal of legal theories to help judges to decide whether to grant declaratory relief.<sup>83</sup> The judge in *National Union* did not cite or employ any of those doctrines to support her conclusion.

In addition, the ruling did not show any sensitivity for the plight of the terrorized victims. That is another major limitation, for it lends some credence to the general perception that courts are significantly more concerned about protecting insurers' interests unconditionally. For sure, third-party victims are the intended beneficiaries under many indemnity agreements as well as under liability and indemnity insurance contracts.<sup>84</sup> It is arguable, therefore, that the very intent of the World Trade Center's lease-indemnification agreement was 1) to force all tenants to secure insurance for the benefit of third-party victims, and 2) to insert broad lan-

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81. *Id.* at 261 (Emphasis added).

82. *Id.* at 261-262.

83. See, e.g., Rice, *supra* note 75, at 1021-1022 nn. 113-117 (outlining various doctrines that courts employ to decide whether to award declaratory relief under contracts — general, insurance, liability and indemnity agreements).

84. Cf. *Assessing The Costs And Benefits - Public Policy Reports*, 71 N.Y. ST. B.J. 32, 33 (April, 1999) (noting that "Liability insured costs include direct written premiums for . . . liability insurance. The . . . premiums [also] . . . reflect the portion of those coverages devoted to paying benefits to third parties [who experience injuries] or damages . . ."). See also David M. Summers, *Third Party Beneficiaries and The Restatement (Second) of Contracts*, 67 CORNELL L. REV. 880, 892 (April 1982).

Under the first Restatement, some courts searched for the primary purpose of the contract. When they found that the contract's primary purpose was to benefit the promisee, [they] concluded that any [third-party] benefit . . . was incidental. This type of analysis is flawed . . . Many contracts have several purposes [and the] parties . . . often intend that some benefit accrue to a third party, although the "primary" benefit of the contract runs to the original parties. *Id.*

guage into the agreement to insure the identity of the party who would assume the ultimate responsibility for compensating those victims.

Unquestionably, *National Union* is not the only poorly reasoned decision. There are others, which easily could lead cynics and judicial watchers to conclude that insurers and their allies on the bench aid and abet terrorists. First, consider the simple facts in *Nichols v. Nationwide Mutual Ins. Co.*<sup>85</sup> On April 19, 1995, Timothy McVeigh bombed the Alfred P. Murrah Federal Building in Oklahoma City, terrorizing and murdering hundreds of people.<sup>86</sup> McVeigh planted the bomb in a rented Ryder truck and parked the vehicle next to the federal building.<sup>87</sup> When the bomb and truck exploded, Richard and Bertha Nichols were sitting a considerable distance away in their small car. Suddenly, the axle from the Ryder truck landed on the hood of their Ford Festiva, causing substantial property damage and bodily injuries.<sup>88</sup>

The Nichols filed a claim under their uninsured-motorist, automobile policy. Later, they sued Nationwide when the company refused to pay. Nationwide filed a motion for summary judgment. The court granted the motion and dismissed the case.<sup>89</sup> Why? The federal judge decided that a

85. *Nichols v. Nationwide Mut. Ins. Co.*, 948 F.Supp. 988 (W.D. Okla. 1996).

86. See Richard A. Serrano and James Risen, *Bombing Suspect in Custody FBI Questions 2nd Man; Death Toll Hits 65 Terrorism*, L.A. TIMES, Apr. 22, 1995, at 1 (stating that "FBI agents arrested a crew-cut suspect . . . in the bombing of a federal building in Oklahoma City, where at least 65 [ultimately, 168] people died . . . Thomas James McVeigh, 26 . . . was put under federal arrest . . . His arrest and the surrender of Terry Nichols . . . made it apparent that the bombing was domestic terrorism.").

87. See Richard Serrano and Ronald J. Ostrow, *FBI Believes Video Shows Bomb Truck*, L. A. TIMES, Apr. 25, 1995, at 1. "The vehicle, a 1993 Ford truck obtained from a Ryder rental franchise in Junction City, Kan., is believed to have delivered 1,000 to 1,200 pounds of a volatile mixture of fuel oil and ammonium nitrate, a fertilizer, to a spot near the front entrance of the nine-story office building shortly before the blast . . . " *Id.*

88. *Nichols*, 948 F.Supp. at 990; see also Kevin Johnson, *Witness Identifies Ryder Truck*, USA TODAY, May 15, 1997, at 3A.

Nichols [said he] saw a humongous object whirling toward them from the direction of the Murrah building. . . [It was] the 250-pound axle from the Ryder truck. . . He said he reached for his wife, who was unbuckling the child from the back seat of their tiny Ford Festiva. It hit the front passenger side of the windshield and knocked the car back about 10 feet," he said. . . [He] sent his family to the hospital. . . *Id.*

89. See also *Id.* at 994.

Plaintiffs [ed] their bad faith claim . . . upon two grounds: 1) Nationwide's citation to a 'terrorist exclusion clause' that was not in the contract, and 2) Nationwide's knowingly incorrect conclusion that the uninsured motorist provision [did] not cover plaintiffs' losses. . . The facts are in dispute regarding plaintiffs' allegation that Nationwide unreasonably and in bad faith cited a fictitious terrorist exclusion clause as an additional basis for denying coverage on the vehicle . . . [As] the [c]ourt has ruled that those losses were properly disputed by Nationwide, plaintiffs' bad faith claim also fails under the fictitious terrorist clause argument. *Id.*

trial by jury was inappropriate, because the Nichols' evidence was insufficient to support every elements of a multi-part test. Under Oklahoma law, insureds must prove the following if they expect insurers to pay uninsured motorist claims: 1) proof that the "injury [arose] out of the use of the motor vehicle"; 2) proof of "a casual connection between the use of the vehicle and the injury"; 3) proof that "the use [is] related to the transportation nature of the vehicle"; 4) proof that "an intervening force [did not] sever the causal connection" between the vehicle's use and the injury; and, 5) proof that the uninsured [was the] owner or operator of the vehicle during the commission of the wrongful act."<sup>90</sup>

Although finding that the Nichols' injuries arose out of the use of the Ryder truck, the judge found no causal connection between Timothy McVeigh's use of that vehicle and the insureds' injuries. How did the judge defend that startling ruling? The judge said: "[O]nce the Ryder truck was parked, it was no longer being used as a vehicle for transportation . . . [Instead, McVeigh was using it to pack and conceal explosives, a use] decidedly not connected to transportation."<sup>91</sup> The judge also ruled against Richard and Bertha because they could not prove that McVeigh was the owner or operator of the Ryder truck when the bomb exploded.

The court reached that highly questionable conclusion this way: "[When McVeigh] detonated the explosives [,] [he was] not engaged in an activity related to the transportation nature of the vehicle. [Consequently,] an operator [did not cause the injuries] . . . during the commission of a wrongful act."<sup>92</sup> Clearly, this is a decidedly strained and superficial analysis, one that lacks any hint of common sense. Even a cursory review of newspapers reveals that Timothy McVeigh operated and exercised control over the Ryder truck. Furthermore, under Oklahoma's doctrine of bailment, McVeigh certainly had a possessory interest<sup>93</sup> in the rented vehicle before it blew up, terrorizing and killing innocent people.

Finally, a New York judge's complex analysis and rulings in *Stawki v. John Hancock Mutual Life Ins. Co.*<sup>94</sup> also raise major concerns. Before

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90. *Id.* at 990-991 (citing *Safeco Ins. Co. of Am. v. Sanders*, 803 P.2d 688, 692-693 (Okla. 1990), in which the Oklahoma Supreme Court outlined the parameters of the test).

91. *Id.* at 991.

92. *Id.* at 993.

93. See *Broaddus v. Commercial Nat. Bank of Muskogee*, 237 P. 583, 584 (Okla. 1925) (holding that "in order to constitute a transaction in bailment, there must be a delivery to the bailee, either actual or constructive. It has been held that such a delivery of property must be made to the bailee as will entitle him to exclude for the period of the bailment the possession thereof, even of the owner.").

94. *Stawski v. John Hancock Mut. Life Ins. Co.*, 163 N.Y.S.2d 155 (1957).

Israel became a state, two Jewish terrorist groups — Irgun Zvai Leumi and Stern Gang — campaigned against British rule in the territory.<sup>95</sup>

Israel became a state on May 14, 1948. A month later [the] Government faced a fateful issue. Irgun . . . tried to bring thousands of guns in on a chartered ship, the *Altalena*. David Ben-Gurion, the Prime Minister, saw it as an attempt to maintain a private army — and that, he said, would ‘murder the state.’ He ordered the *Altalena* shelled. The ship sank off Tel Aviv.<sup>96</sup>

Abraham Stawski was on the *Altalena*. However, he neither owned the chartered vessel nor performed any official duties during its voyage. Stawski was the manager, and he was sitting in the mess room when the Israeli Army attacked.<sup>97</sup> He died the next day from fatal wounds. Before the voyage, Stawski purchased a life insurance policy from John Hancock Mutual Life. A supplemental coverage provision stated in pertinent part: “[The company will pay when the beneficiary proves that] the Insured’s death was caused . . . by a bodily injury sustained solely by external, violent, and accidental means.”<sup>98</sup> But, an exceptions clause stated in relevant part: “No such Additional Benefit will be payable . . . if death results, directly or indirectly, or wholly or partially . . . from injuries intentionally inflicted on the Insured by any person . . . or from a state of war, riot or insurrection . . . .”<sup>99</sup> Clearly, the language in the policy was ambiguous.

Brocha Stawski — the decedent’s wife and beneficiary — tried to collect under the supplemental provision. John Hancock refused to pay, and she sought relief in court. The judge ruled in favor of the insurer. Why? First, the court justified its decision by highlighting the insurer’s contrac-

95. Jonathan Freedland, “*I Used To Be A Terrorist*,” THE GUARDIAN (LONDON), Dec. 4, 2001, at 8.

[Uri Avnery] is a 78-year-old Israeli patriot. . . He has served three terms in the Knesset and is a national legend in his home country. . . He has no time for the current talk of removing Arafat and replacing him with a more pliable leader. . . ‘After all,’ he says, ‘I used to be a terrorist myself.’ . . . [At age] 15, he joined the Jewish underground against ‘colonial British rule,’ fighting in the Irgun, the right-wing group headed by Menachem Begin. . . [He] remembers that the extremist Jewish groups melted away . . . [and] . . . believes, the likes of Hamas and Jihad would go the way of the Irgun and Stern Gang: they would become redundant overnight. *Id.*

96. Anthony Lewis, *Abroad at Home — A Fateful Choice*, N.Y. TIMES, Apr. 17, 1988, at 27. See also Stawski, 163 N.Y.S.2d at 156-57 (stating that “The master further testified that at Kvar Vitken some thirty men came on board the *Altalena* and that these men were members of the Irgun, a military organization in Israel at odds with the government and carrying on terrorist activities . . . [The] attack was made by the Haganah, then the official army of Israel.”).

97. Stawski, 163 N.Y.S.2d at 157.

98. *Id.* (emphasis added).

99. *Id.* (emphasis added).



tual defenses under the “state of war” and “insurrection” language in the exclusion clause. But the court conveniently ignored two important facts: 1) John Hancock did not prove that Israel was in a state of war with its own citizens—the members of the Irgun and Stern Gang; and, 2) The insurer did not present any evidence to establish that those terrorist organizations were “insurgents,” operating against Israeli interests.<sup>100</sup> In fact, they were working to protect Israel and to secure her national interests.

Without doubt, the ruling in *Stawski* is vexing for two reasons. First, the judge spent an inordinate amount of energy trying to determine whether “accidental means” or “intentional conduct” was the proximate cause of the Abraham’s death,<sup>101</sup> without clearly defining those terms. Quite simply, the court’s analysis was extremely inappropriate because New York had embraced several recognized theories to help tribunals to interpret ambiguous terms and conditions in insurance contracts.<sup>102</sup> Clearly, the judge should have employed one of those doctrines at the outset; instead, the court chose an exceedingly complicated proximate-cause-foreseeability analysis to reach a strained and highly suspect conclusion.

Second, even if the proximate-cause analysis was the appropriate test, the beneficiary still should have prevailed. Why? In one instance, the judge found that an “accident” was the independent cause of Abraham’s death.<sup>103</sup> But the judge also declared that an “intentional act” was the

100. *Id.* at 158 (“No finding need [be] made as to whether the *Altalena* was controlled by insurgents. . .”).

101. *Id.* at 159 (“Israeli forces opened a destructive bombardment of shot[s] . . . on the *Altalena* while it was in Tel Aviv harbor [. . .] [The] death of a passenger as a result of such a barrage ‘cannot be said to be unforeseen, unexpected or extraordinary.’ Indeed, it would have been a phenomenon if no one had been hurt. Serious injury to those on board was inevitable . . .”).

102. *Janneck v. Metro. Life Ins. Co.*, 57 N.E. 182, 182 (N.Y.1900).

In considering insurance contracts courts should be guided by two cardinal rules of universal application. The first is that, when the language is clear and unequivocal, the contract should be enforced according to its terms, without regard to the equitable considerations, which may be urged in avoidance of it. [“Plain Meaning Rule”]. The second is that, when the language of an insurance contract is so ambiguous as to render it susceptible of two interpretations, it should be most strongly construed against the insurer, because the latter has prepared the contract, and is responsible for the language used.” — [“Doctrine of Ambiguity”] *Id.*;

*Burr v. Commercial Travelers Mut. Accident Ass’n of Am.*, 295 N.Y. 294, 301 (N.Y. 1946) (“Our guide must be the reasonable expectation and purpose of the ordinary business man when making an insurance contract[.] — [“Doctrine of Reasonable Expectation”].

103. *Stawski*, 163 N.Y.S.2d at 157 (“The proof adequately shows death was the result of accidental means.”).

sole cause of death.<sup>104</sup> Obviously, the decision is seriously flawed and unintelligible, for New York's insurance law is exceptionally clear about two matters: 1) the intentional infliction of an injury is not accidental;<sup>105</sup> and, 2) a court must construe ambiguous language in an insurance policy against the insurer, if the language generates harsh or unreasonable results.<sup>106</sup>

Even though the evidence appearing above is rather unsettling, we still must ask: is it compelling enough to establish conclusively that courts are biased in favor of insurance companies? More important, do the findings prove categorically that insurers intentionally aid and abet terrorists, by refusing to compensate the terrorized insured and third parties when those persons present and prove legitimate claims? Do these revelations conclusively establish that state and federal courts intentionally or unintentionally aid and abet terrorists? At first blush, the answer to each question is yes. Certainly, the findings in *National Union, Nichols, and Stawski*, as well as several other cases,<sup>107</sup> strongly suggest that courts are significantly more likely to rule in favor of insurers than victims of terrorism; and judges issue such rulings more frequently than one would expect.

104. *Id.* at 159 ("[It] must be held that the death of the insured resulted from injuries intentionally inflicted within the meaning of the policy.").

105. *Rex Roofing Co. v. Lumber Mut. Cas. Ins. Co. of N.Y.*, 116 N.Y.S.2d 876, 877-78 (1952) ("[The] dictionary [defines] an accident as an event which is unexpected, the cause of which cannot be traced, or at least is not apparent [...] . . . "[The] intentional infliction of injury cannot be regarded as an accident . . ."); *Nellenback v. Metro. Life Ins. Co.*, 3 N.Y.S.2d 657, 659 (N.Y. Mun. Ct. 1938) ("The rule . . . seems to be well established that where one is in the act of doing that which he intended to do, and where no extraneous force or occurrence unforeseen is brought in to divert from the intended act, there has been no accident."); *Appel v. Aetna Life Ins. Co.*, 83 N.Y.S. 238, 241 (N.Y. App. Div. 1903), *affd.*, 72 N.E. 1139 (N.Y. 1904) ("[The] evidence wholly fails to show that the deceased did anything which he did not fully intend to do . . . ; therefore the result of such acts—his death—was not produced by 'accidental means.'").

106. *Atl. Basin Iron Works v. Am. Ins. Co.*, 226 N.Y.S. 676, 678 (N.Y. App. Div. 1928) ("If [the language] is fairly susceptible of two interpretations . . . it should be most strongly construed against the insurer. A construction which makes the contract fair and reasonable will be preferred to one which leads to harsh or unreasonable results.").

107. *Younis Bros. & Co. v. Cigna Worldwide Ins. Co.*, 899 F.Supp. 1385, 1399 (E.D. Pa. 1995) (holding that the insureds' evidence was not sufficient enough to support the jury's findings that the insurance company must pay for the insureds' property which was destroyed in Monrovia, Liberia during an insurrection); *Wilker Bros. Co., Inc., v. Lumbermans Mut. Cas. Co.*, 529 F.Supp. 113, 118 (S.D. N.Y. 1981) (holding that the insurer did not have to compensate the insured when a mob looted and terrorized the insured's pajama factory in 1979 during a civil war and insurrection in Nicaragua); *Int'l Wire Works v. Hanover Fire Ins. Co.*, 283 N.W. 292, 293-294 (Wis. 1939) (dismissing insured's complaint and holding that the insurer with a contract to provide coverage against damage or loss caused by riot, had no duty to pay for damages stemming from mob action and terror).

On the other hand, however, the evidence is not so compelling if we limit our examination to data obtained solely from “modern” records, documents and reported judicial decisions. In fact, several relatively recent cases<sup>108</sup> suggest that some courts have decided insurance controversies in favor of the insured and victims of terrorism. Consider the facts in *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*,<sup>109</sup> a fairly renowned case. On September 6, 1970, Palestinian terrorists<sup>110</sup> hijacked a Pan American 747 airliner over London and forced the crew to fly to Egypt. After landing in Cairo, the hijackers released the passengers. Then they detonated explosives, which completely destroyed the aircraft.<sup>111</sup> After the losses, Pan Am asked its all-risks insurers to make reimbursements.

Some underwriters refused vehemently, arguing that “excluded perils” — hijackings, war, war-like operations, insurrection and others<sup>112</sup> — rather than “covered perils,” proximately caused the 747’s destruction and subsequent financial losses. Pan American sued. The federal judge ruled in favor of Pan Am, declaring that the language appearing in the exclusion clause was, at best, ambiguous. The judge stressed that the ancient marine insurance language in the exclusion clause simply did not

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108. *Sherwin-Williams Co. v. Ins. Co. of Penn.*, 863 F.Supp. 542, 545-48 (N.D. Ohio 1994) (Although a terrorism exclusion appeared in the policy, the case turned on the interpretation of a “civil commotion” provision. The court held that the insurer must compensate Sherwin-Williams for losses caused by looting and vandalism, following the United States’ invasion of Panama in 1989); *New Mkt. Inv. Corp. v. Fireman’s Fund Ins. Co.*, 774 F. Supp. 909, 915-17 (E.D. Pa. 1991) (Embracing the jury’s finding, the court held that Fireman’s must compensate Frupac International — an importer of Chilean fruit — for financial losses proximate caused by terrorists, disgruntled Chileans who had contaminated the grapes with cyanide); *Frupac Int’l Corp. v. Fireman’s Fund Ins. Co.*, 1990 WL 204380, \*1 (E.D. Pa.) (denying the insurer’s motion for declaratory relief).

109. *Pan Am. World Airways Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989 (2nd Cir. 1974).

110. *Id.* at 998-99.

[Two men, Diop and Gueye, acting for the Popular Front for the Liberation of Palestine,] purchased tickets in Amsterdam for Pan American Flight 093 . . . . Forty-five minutes after Flight 093 departed from Amsterdam, Diop and Gueye produced handguns and grenades, and took control of the aircraft, ordering the crew to fly to Beirut, Lebanon. . . . After Diop and Gueye threatened to blow up the 747 in mid-air if not permitted to land, Lebanese officials reluctantly granted permission on the condition that it take off again after refueling. The 747 took off for Cairo, still under PFLP command. Again after PFLP threats, Egyptian officials reluctantly gave their permission for it to land. The explosive fuses were lit while the aircraft was still in the air. After landing, the passengers were evacuated in good order. The explosives detonated on schedule, and the 747 was a total loss.” *Id.*

111. *Id.*

112. *Id.* at 1005.

describe the Palestinian terrorists' "violent and senseless intercontinental hijacking" over London.<sup>113</sup>

Therefore, reviewing just contemporary "pro-insured" and "pro-insurer" cases and related materials will not produce a decisive answer to the question: do insurers and their alleged allies on the bench aid and abet terrorism? But, terrorism is not just a modern phenomenon; it has an exceedingly long history.<sup>114</sup> Arguably, one of the longest periods of commercial terrorism in Western democracies occurred during the transatlantic slave trade. More important, research has uncovered some scattered, but fairly rich historical records, confirming that both British and American underwriters participated heavily in the terrors of slave trade from the very inception of that commerce. Also, hundreds of British and American insurance-law cases have preserved a remarkable record of insurers' role in the slave trade, from the mid-seventeenth to the mid-nineteenth century. Therefore, with these resources, we can substantially increase the likelihood of answering the questions presented above more intelligibly and definitively.

Why is it important to determine whether insurance companies and courts have a propensity to aid and abet commercial and other types of terrorists? Among other reasons, two are outstanding. First, in post-September 11th America, President George W. Bush and members of the Bush II Administration<sup>115</sup> have stated repeatedly: America has entered a new era;<sup>116</sup> and, the country should expect repeated terrorist attacks.<sup>117</sup>

113. *Id.*

114. Linda Doherty, Carolyn Cummins, & Claire O'Rourke, *Scramble For Terror Cover As Insurers Quit*, SYDNEY MORNING HERALD, Dec. 18, 2001, at 1 ("The United Kingdom and South Africa with long histories of terrorism have insurance terrorism pools."); Richard F. Teichgraeber III, *Multiple Forms Of Terrorism Are Challenge To Society*, TIMES-PICAYUNE, Apr. 25, 1995 at B7 ("Mytho-terrorism may be the oldest and most familiar form of terrorism. Others include state terrorism, which has a long history in our century: Hitlerite Germany, Stalinist Russia, Suharto's Indonesia, Argentina's 'Dirty War,' Idi Amin's Uganda, Pol Pot's Khmer Rouge . . . the list goes on.").

115. *The Bushes: A Dynasty is Born*, BALTIMORE SUN, Jan. 28, 2001, at 4M.

As president, George Herbert Walker Bush [refused to] visit the tiny English village of Messing, in Essex, where in 1631 — 11 years after the Mayflower — a farmer named Reynauld Bush decided to leave for New England, establishing the American branch of the Bush family [:] historians aren't ready to anoint them the nation's preeminent dynasty ever . . . But a two-term Bush II administration could help. . . *Id.*

116. Dan Eggen, *Tough Anti-Terror Campaign Pledged — Ashcroft Tells Mayors He Will Use New Law to Fullest Extent*, WASH. POST, Oct. 26, 2001, at A1 ("Ashcroft, in declaring 'a new era in America's fight against terrorism,' said the bill will allow 'airtight surveillance' of terrorist networks . . . to disrupt plans for further attacks").

117. Greg Jaffe & Chip Cummins, *Victories Extend Alliance's Hold in Afghanistan*, WALL ST. J., Nov. 12, 2001, at A3 ("In his first appearance before the U.N.'s General Assembly. . . President Bush warned that 'every nation has a stake in this cause [:] the

More relevant, Attorney General Ashcroft has stated unequivocally that the Bush II Administration will “identify, locate and incapacitate terrorists and those who aid and abet them.”<sup>118</sup> For that reason, we ask: was the attorney general thinking about national and international insurance companies and about American and English courts when he made that declaration? If so, we should examine those institutions’ historical records to determine 1) whether they have aided and abetted commercial terrorism, and 2) whether they are likely to aid and abet terrorists again. These concerns, therefore, become the focus of this Article.

**Part I** presents a fairly short discussion of the various forms of terrorism, and it critiques and challenges the conventional wisdom about who qualifies as a terrorist and what qualifies as terrorism. **Part I** also stresses that the activities and persons associated with the transatlantic slave trade qualify as terrorism and terrorists — respectively — under anyone’s definition of those terms. More important, **Part I** reveals that English courts certainly viewed the slave trade as being both terrorism and illegal commerce. Of course, later in the article, the relevance of this point will become more apparent. At that point a discussion of how insurance companies’ commercial activities helped to terrorize young African fathers, mothers and children appears.

**Part II** outlines various American doctrines about aiding and abetting liability, those appearing in the common-law and under various statutes. They come in two flavors — civil and criminal. In addition, **Part II** explores aiding and abetting liability in England. Even though a good portion of the American doctrines evolved out of English common law — which prohibits persons from aiding and abetting criminals, American and English civil aiding and abetting rules are somewhat different. **Part II**, therefore, highlights the convergences and divergences.

**Part III** gives a short overview of all-risks commercial and marine insurance contracts as they developed in England and in America. Necessarily, a general discussion of terrorism coverage and of other types of perils will occur, along with a discussion of insurers’ and the insured’s contractual rights and obligations under all-risks insurance agreements. This part also describes the scope of insurance regulation in England and in America, presently and historically. Most definitely, there are significant differences and those dissimilarities greatly affect whether insurers

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terrorists are planning more murder — perhaps in my country or perhaps in yours.”); Jill Carroll, *National Guard Takes on Big New Role At the Front Lines of Homeland Defense*, WALL ST. J., Oct. 2, 2001, at B5 (“In the wake of the . . . terrorist attack . . . Attorney General John Ashcroft underscored the urgency of the task . . . saying the U.S. faces a ‘very serious threat’ of more terrorism.”).

118. Crittenden, *supra* note 1, at P8.

are criminally or civilly liable for aiding and abetting terrorists in the respective countries.

Again, it is worth repeating: the totality of the transatlantic slave trade was economic or commercial terrorism. Therefore, **Part IV** presents a comprehensive discussion of British and American insurers' roles as aiders and abettors of that nefarious enterprise. The analysis covers insurance companies' direct and indirect participation, before and even after the enactment of anti-slave trade legislation in England and in America.

Under both English and American civil laws, there are some arguably "settled" legal principles: 1) courts will not open their doors to persons with "unclean hands;" 2) declaratory and equitable actions cannot proceed in courts if the underlying conflicts involve illegality; and 3) courts will not enforce any illegal contracts, including insurance contracts. **Part V** thoroughly discusses those legal doctrines under English and American law, respectively. These principles are discussed in the first instance because they have significant bearings on the discussion in **Part VI**. The two systems are discussed separately because there are some fairly significant differences between English and American rules.

**Part VI** documents and illustrates how British and American courts aided and abetted the slave traders' terrorist activities, before and after the enactment of anti-slave trade legislation in the two countries. This part shows convincingly that American and English courts intentionally disregarded, failed to remember, circumvented and deviated from settled principles of law to help insurance companies practice economic terrorism.

Finally, the conclusion section discusses some implications of the findings reported in this article. As mentioned at the outset, the Bush II Administration has made it clear that terrorism will become more prevalent in this country and that resources will be invested to apprehend and punish those who aid and abet terrorists. The article concludes by encouraging public officials to expand their definitions of terrorism, aiding and abetting. It urges members of the legal community to start monitoring courts' and insurance companies' activities more carefully to ensure that those institutions do not wittingly or unwittingly aid and abet terrorism, regardless of the form in which it might appear.

## PART I. AN OVERVIEW: "TERRORISM"—COMPETING DEFINITIONS, VARIOUS ORIGINS, TYPES AND DIMENSIONS

### A. *The Conventional Wisdom Regarding Terrorism and Terrorists*

It is important to repeat what others have observed: International organizations and academicians have not embraced a universal definition of

terrorism.<sup>119</sup> As of this writing, even the United Nations cannot define the term without generating disagreement.<sup>120</sup> Therefore, given the absence of a common definition, all sorts of human activities, including clearly legitimate economic, political, and social activities<sup>121</sup>—have been labeled terrorism. On the other hand, if one carefully examines legal commentaries as well as printed and televised news reports, one could easily conclude: “true terrorism”<sup>122</sup> only appears in a few, unadulterated flavors — domestic,<sup>123</sup> international,<sup>124</sup> state-sponsored<sup>125</sup> and state-

119. David Kris, *Interpreting 18 U.S.C. §2331 Under U.S. and International Law*, 27 HARV. J. ON LEGIS. 579, 592 (1990) (“[N]o generally accepted definition of terrorism has emerged in the international political arena. Academic efforts to define the term have fared no better.”).

120. See generally James C. Hathaway and Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 CORNELL INT’L L.J. 257, 267-270 (2001) (discussing the history of attempts to reach a common definition of terrorism).

121. See, e.g., Leigh Strobe, *Rebel Flag Removal Advances in South Carolina*, THE SEATTLE TIMES, May 12, 2000 at <http://archives.seattletimes.nwsourc.com> (last visited Jan. 19, 2002). “A bill to remove the Confederate flag from the Capitol dome gained final House approval . . . Flag supporters in the House such as Republican Rep. Ron Fleming tried to derail the compromise, saying, ‘I don’t think we need to give in to economic terrorism.’” *Id.* Barry Meier, *Clinton’s Lawsuit Threat Shocks Tobacco Industry*, THE NEW YORK TIMES, Jan. 20, 1999, at A20. “President Clinton’s announcement that the Justice Department was preparing to sue cigarette makers came as a shock . . . . A spokesman for the cigarette industry, Scott Williams, said . . . ‘This political and economic terrorism against the industry has got to stop [.]’” *Id.* James Worsham, *Labor Comes Alive*, NATION’S BUSINESS, Feb. 1996, at 16, available at 1996 WL 8505597. “Organized labor, its ranks and political power at a low ebb, is rattling its sabers and marshaling its forces for a new crusade to regain the clout it once had in the nation’s factories and ballot boxes. . . . Thomas J. Donohue, president and chief executive officer of the American Trucking Associations, [said]: . . . ‘Corporate campaigns amount to economic terrorism . . . .’” *Id.*

122. Cf. Jeffrey Fleishman, *In Italy, a Resurgence of Terrorism —These Radicals Aren’t as Violent as the Notorious Red Brigade, but Security has been Increased*, PHILADELPHIA INQUIRER, May 6, 2001, at A2. “The Italian Interior Ministry is publicly playing down the spasm of terrorism . . . . ‘The terrorist situation in Italy is of maximum concern but there is no need for alarm,’ said Interior Minister Enzo Bianco. ‘Italy is in a very different atmosphere from what it was 20 years ago, when every day true terrorism was capable of striking.’” *Id.*

123. See, e.g., Frank Keating, *Domestic Terrorism: A Leadership Response*, 21 OKLA. CITY U. L. REV. 187, 187-189 (1996) (listing examples and incorrectly observing that the “bombing of the Murrah Federal Office Building in . . . Oklahoma City on April 19, 1995 . . . was an unprecedented act [because] [n]ever before had an American community been targeted by apparent domestic terrorists . . . .”) (emphasis added).

124. See generally Book Note, *Legal Aspects of International Terrorism*, 93 HARV. L. REV. 1395 (1980) (discussing and presenting a very narrow view of international terrorism).

125. See, e.g., William P. Hoye, *Fighting Fire With . . . Mire? Civil Remedies and the New War on State-Sponsored Terrorism*, 12 DUKE J. COMP. & INT’L L. 105, 106 (2002) (stating that “[u]ndoubtedly, few acts, if any, are more egregious or shocking to the con-

supported<sup>126</sup> terrorism.

Moreover, the conventional wisdom about terrorism has produced some additional, unsubstantiated conclusions: 1) terrorism is primarily a twentieth century development;<sup>127</sup> 2) among the community of nations, only a few "rogue" states export terrorism;<sup>128</sup> 3) "true terrorists"<sup>129</sup> are more likely to be members of certain ethnic<sup>130</sup> and religious<sup>131</sup> groups; and, 4) "true terrorists" are substantially more likely to commit violent

science than states utilizing their vast sovereign powers and resources to finance and sponsor acts of terrorism . . .").

126. Cf. Frederic L. Kirgis, J., *The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506, 516 (observing and restating that "[m]ere allegations that a particular government supports terrorism do not make the case). For example, "if the United States, for example, has evidence of Libyan state-supported terrorism, as it has claimed it does, it could make the evidence available to the Security Council in a way that would protect intelligence sources." *Id.*

127. See, e.g., Maggie Mulvihill, *Experts: No Foolproof Method of Thwarting Terrorist Attempts*, BOSTON HERALD, Jul. 28, 1996, at P10. "'(Terrorism) is a risk of the 20th century,' said Northeastern University Professor Edith Flynn, an expert in criminal justice and international terrorism." *Id.* But see Patricia A. Long, *In the Name of God: Religious Terrorism in the Millenium – An Analysis of Holy Terror, Government Resources, and the Cooperative Efforts of a Nation to Restrain its Global Impact* 24 SUFFOLK TRANSNAT'L L. REV. 51, 56 nn. 14-19 (2000) (discussing and naming a variety of religious terrorist organizations — the Jewish Zealots from 66-70 AD; the Islamic Assassins (Nizari) from 1090 to 1275; and the First Crusades' Urban II, commencing about 1095— that practiced terrorism many millennia ago).

128. Barry Schweid, *Report: Terrorism Sets Record State-Sponsored Violence Ebbs, but Privately Funded Killers More Active*, ATLANTA J. CONST., May 2, 1999, at B2. "The department made no changes in listing seven countries — Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria — as sponsors of terrorism." *Id.*

129. See, e.g., Edward J. Fitzpatrick, *Letters to the Editor — Heroes, Not Terrorists*, WALL ST. J., Jan. 11, 2002, at A11.

Robert Bartley's observations in 'Conquering Guilt, Forging a New Era' militarily . . . [identifies] Eamon De Valera[,] a major leader in the Irish struggle for freedom, 1916-21 as a terrorist (*Thinking Things Over*, Jan. 7). DeValera and the other Irish patriots were true heroes who successfully culminated a 700-year struggle against English imperialism . . . The true terrorists were the British imperialists . . . *Id.*

See also Editorial, *Terrorists Return to Action*, ATLANTA J., Dec. 26, 1991, at A12, available at 1991 WL 8005985.

Optimists . . . [thought] that perhaps terrorism had run its course as a political tactic among those who hate Israel. There were signs, to be sure, that the practice was leading nowhere . . . But true terrorists are as stubborn as they are stupid, and they could not let such a year of promise end without doing something to dash the hopes of decent people. *Id.*

130. See U.S. Attorneys, *Police to Interview Young Foreign Men Justice Department Acts on New Anti-Terror Focus War on Terrorism: The Nation*, BALT. SUN, Nov. 14, 2001, at 12A, available at 2001 WL 6175559 (stating that "[c]ivil rights groups have accused federal investigators of unfairly targeting people based on ethnicity in the sweeping investigation of the Sept. 11 hijacking attacks on New York and Washington").

131. *Connecting the Dots*, WASH. POST, Nov. 24, 2001, at A22, available at 2001 WL 30327700. "The federal campaign to disrupt potential terrorists is as aggressive as any in



and horrendous acts for political rather than for economic or commercial reasons.<sup>132</sup>

Of course, a thorough critique of these conclusions will not appear here. But these points are important: commercial terrorism is as real as political terrorism; and certain forms of the former are as lethal as certain forms of political terrorism. And although commercial or economic terrorism has not been defined universally, some commentators define it as the "unlawful use of force or violence against persons or property to intimidate or coerce commercial interests."<sup>133</sup> Moreover, it appears that economic terrorism occurs fairly frequently. Insurance companies certainly insure against it,<sup>134</sup> and, the topic generates a considerable amount of interest within the legal community.<sup>135</sup> But more important, private organizations,<sup>136</sup> governments<sup>137</sup> and corporate entities<sup>138</sup> have been accused of practicing various forms of commercial terrorism.

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modern times. And in a country that resists ethnic and religious stereotyping and the assignment of group blame, it is a campaign that goes right up to the line." *Id.*

132. See, e.g., Leah M. Campbell, *Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan*, 74 TUL. L. REV. 1067, 1070 (2000). "The United States defines terrorism as 'premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.'" *Id.* See also Jim Hoagland, *The Political Uses of Terrorism*, WASH. POST, Feb. 27, 1994, at C7. "Invariably, . . . terrorist-fanatics . . . pour out a lifetime of personal anger and frustration into acts that they believe will have broad political effect . . . Such acts rarely have the larger political impact that their perpetrators and supporters intend." *Id.* But see William Porter, *Journalist Says U.S. Target for Terrorism*, PHOENIX GAZETTE, May 31, 1989, at C1. "Terrorism — not Soviet missiles — is the biggest threat to America's security . . . [Jack] Anderson calls it 'entrepreneurial terrorism' — sophisticated, professional terrorists-for-hire who are motivated more by money than ideology." *Id.*

133. Bruce Braun, Dane Drobný and Douglas C. Gessner, *www.commercial-terrorism.com: A Proposed Federal Criminal Statute Addressing the Solicitation of Commercial Terrorism Through the Internet*, 7 HARV. J. ON LEGIS. 159, 160 (2000).

134. See, e.g., Michele Chandler, *Insurers Want Terrorism Cap*, MIAMI HERALD, Jan. 11, 2002, at 3C. "About 430 commercial insurers operate in Florida. State officials have received 115 requests to either drop or place limits on terrorism coverage for commercial policies . . . The flood of requests for limits comes after Congress failed to weigh in on the commercial terrorism insurance issue . . ." *Id.*

135. See Joan Biskupic, *Lawyers Find Something in Common in Common Law*, USA TODAY, Jul. 17, 2000, at 3A, available at 2000 WL 5783970.

The largest [7000] contingent of American lawyers to converge here in 15 years open[ed] . . . the American Bar Association's four-day meeting in the cradle of the United States' legal tradition [Runnymede, England] . . . Panels over the next four days will address issues such as international human rights, the death penalty, cyberspace law and economic terrorism. *Id.*

136. See, e.g., Jerry Knight, *Economic Terrorism Comes With a High Price*, WASH. POST, Sept. 17, 2001, at E1, available at 2001 WL 27733138 (stressing that the "long-term threat is that the World Trade Center bombing will push the U.S. into a recession" and that billions of dollars will be authorized to win the war against economic terrorism); Sam

Finally, even though the world community cannot agree on a common definition of political or commercial terrorism, some acts are substantially more likely to be perceived as terrorism—regardless of one's religion,

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Howe Verhovek, *In a Verdict, a Sign that His Town is no Haven for Hate*, N.Y. TIMES, Sept. 9, 2000, at A7, Col. 1 (reporting the local mayor's sentiment: "[T]he Aryan Nations has committed 'economic terrorism' against his city"); Sanjoy Hazarika, *Focus is on Tamils in Bombay Blasts*, N. Y. TIMES, Mar. 14, 1993, at 7 (describing "the explosions that killed 250 people and wounded more than 1000 . . . as 'brutal economic terrorism.'"); and, Dirk Johnson, *Indian Fishing Dispute Upsets North Woods' Quiet*, N.Y. TIMES, Apr. 24, 1988, at 20. "Tom Maulson[s], a 46-year-old Chippewa[,] . . . fishing craft was rammed by white boaters . . . 'The Indians are raping the resources,' said Dean Crist, the protest group leader, who was arrested . . . and accused of vandalizing the van of a Chippewa fisherman. 'It's a blatant attempt at economic terrorism.'" *Id.*

137. See, e.g., Arundhati Roy, *The Algebra of Infinite Justice*, GUARDIAN, Sept. 29, 2001, available at [http://www.guardian.co.uk/saturday\\_review/story/0,3605,559756,00.html](http://www.guardian.co.uk/saturday_review/story/0,3605,559756,00.html) (last visited Jan. 12, 2004) (arguing that the World Trade Center and the Pentagon were chosen intentionally as the targets of the attacks and suggesting "that the stygian anger that led to the attacks has its taproot in the U.S. government's record of commitment and support [for] economic terrorism outside America"); Kevin Sullivan, *Castro Warns About U.S. Military Plans: Cuba's President Says Fighting Could Lead to "Infinite Killing of Innocent People"*, WASH. POST, Sept. 23, 2001, at A38 (stating that "Cuban musicians donated blood for the attack victims and Cuba offered other humanitarian aid, largely setting aside its contention that the four-decade-old U.S. economic embargo constitutes 'economic terrorism'"); Lee Michael Katz, *Ex-Hostages Seek Slice of Iran's Assets*, USA TODAY, Oct. 14, 1992, at 1A (reporting that "Iran profited from 'commercial terrorism' by linking [Joseph Cicippio's and David Jacobsen's] release to U.S. payments of once-frozen Iranian assets"); William Claiborne, *South Africa's Vital Minerals Figure in Sanctions Fight: Cutoff of Strategic Exports Could Hurt West*, WASH. POST, May 6, 1988, at A1, available at 1998 WL 2054610 (reporting that the Botha government viewed the economic sanction as "an act of economic terrorism"); Nora Boustany, *Aide to Berri Says Amal Has No Role in Case of 7 Americans Islamic Jihad: Issues New Threat*, WASH. POST, Jul. 4, 1985, at A21, available at 1985 WL 2108075 (reporting that the Lebanese government describes America's move to close its airport as "economic terrorism").

138. See Jose de Cordoba, *Armed Men in Haiti Strike Aristide Palace: President is Secure, as Mobs Burn Offices of Opposition Leaders*, WALL ST. J., Dec. 18, 2001, at A10 (reporting that after international donors cut off aid to protect contested elections, President Aristide "accused the international community of 'economic terrorism'"); Linda Ashton, *Apple Workers, Teamsters Eager for Summer Hearings*, SEATTLE TIMES, Jun. 25, 1998 at <http://archives.seattletimes.nwsourc.com> (last visited: January 19, 2002). "[T]he National Labor Relations Board filed complaints against Stemilt and Washington Fruit, accusing them of intimidating workers to keep out the Teamsters. 'What they are using against the workers is economic terrorism.'" *Id.* See also Peter Sinton, *Lines Drawn on Securities Initiative*, SAN FRAN. CHRON., Jun. 25, 1996, at C1 (reporting that opponents of an anti-securities fraud initiative view the process as "economic terrorism since it would pressure companies to settle meritless suits"); Evelyn Richards, *Revlon Suit Revives the Issue of 'Sabotage' by Software Firms; Manipulation of Computer Programs Damages Credibility*, WASH. POST, Oct. 27, 1990, at C1, available at 1990WL 2101829 (reporting that after saboteurs disabled software that controlled the company's operations, a company representative "condemned the act as 'sabotage' and 'something verging on commercial terrorism'").

ethnicity, socioeconomic status, political orientation or geographical location. Those acts are: 1) "the use of force or threats to demoralize, intimidate and subjugate a group of people";<sup>139</sup> 2) committing or threatening to commit a "murder, kidnapping and hijacking — with the clear intention to intimidate a population";<sup>140</sup> 3) "kidnapping, maiming and murdering" innocent persons to secure political ends;<sup>141</sup> 4) stealing and kidnapping for profit;<sup>142</sup> and, 5) raping, murdering and kidnapping a people to demoralize them.<sup>143</sup>

## B. *The Transatlantic Slave Trade As A Form of Commercial Terrorism*

Arguably, when the average citizen thinks about terrorism, the transatlantic slave trade<sup>144</sup> does not readily come to mind. Among many reasons, the horrors of that commercial enterprise have not received comprehensive coverage in most American secondary schools.<sup>145</sup> Nevertheless, serious historians and researchers continue to reveal how disreputable commerce produced widespread and brutal violence over many centuries. Arguably, it was one of the worse forms of commercial terror.<sup>146</sup> In addition, the transatlantic slave trade was a combination of

139. Sandy Banks, *They Rule by Fear Right Here at Home*, L.A. TIMES, Dec. 11, 2001, at 1 Part 5 ("[M]aybe we're so preoccupied with foreign terrorism these days, we don't realize the threat posed by urban terrorists in our midst.").

140. Charles Bremner, *Italy Blocks Agreement on Europe Warrant—War on Terror*, THE TIMES (LONDON), Dec. 7, 2001, at 18, available at 2001 WL 29009975 ("The definition will exclude civil protests such as those by the anti-globalisation movement.").

141. A.D. Maclin, *Terrorism*, CHI. TRIB., Apr. 16, 1990, at 12.

142. *Hargrove v. Underwriters at Lloyd's*, London, 937 F.Supp. 595, 600 (S. D. Tex. 1996) (The Colombia legislature passed the ANTI-ABDUCTION ACT, ACT 40 OF 1993 which prohibits insurance companies from abetting and aiding terrorists. Insurers face up to five years in prison if they pay ransom.)

143. See Merilie Robertson, Letters Desk — *Terrorism and Legal Niceties*, L.A. TIMES, Oct. 29, 1985, at 4, Part 2 (reporting that "Terrorism is something about which we are all concerned. I refer to U.S.-sponsored terrorism in Nicaragua. The war being waged by the Contra forces is pure and simple terrorism. [T]he Contras kidnap, rape, torture and kill, for purposes of demoralizing people").

144. See generally James Pope-Hennessy, *SINS OF THE FATHERS: A STUDY OF THE ATLANTIC SLAVE TRADERS — 1441-1807* (N.Y.: Alfred A. Knopf 1968); REV. RUFUS W. CLARK, *THE AFRICAN SLAVE TRADE* (Boston, Am. Tract Society, 1970); F. George Kay, *THE SHAMEFUL TRADE* (LONDON: FREDERICK MULLER, 1967).

145. But see Glen Elsasser, *Irish-Americans Demand Famine Be Taught In Schools*, CHI. TRIB., Mar. 16, 1998, at 1.

State education officials may be wary of legislative mandates, but since the early 1990s a number of states have encouraged or required school officials to include sensitive historical topics in their curriculums. In Massachusetts, legislation has been framed so that schools teach not only the Irish potato famine but also 'the Transatlantic Slave Trade and Middle Passage [. . .]' *Id.*

146. See, e.g., Kay, *supra* note 144, at 1.

state-supported,<sup>147</sup> state-sponsored,<sup>148</sup> domestic<sup>149</sup> and international<sup>150</sup> terrorism. Consequently, it generated all sorts of terroristic acts before,

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The purchase or capture of some fifty million human beings for a period of four centuries was perhaps the greatest crime against humanity ever perpetrated by Christendom, not least because those responsible for the most part saw no moral evil in treating men, women and children as merchandise. [T]he Nazi cremation camps and slave labour regiments pale into a brief and minor aberration of a civilized people. *Id.*;

A VIEW OF THE PRESENT STATE OF THE AFRICAN SLAVE TRADE: PUBLISHED BY DIRECTION OF A MEETING REPRESENTING THE RELIGIOUS SOCIETY OF FRIENDS IN PENNSYLVANIA, NEW JERSEY, ETC., 6 (Philadelphia: William Brown Printer, 1824) ("When the atrocious character of the African slave trade and the various laws enacted for its suppression are considered, it may appear incredible that this traffic should still continue to disgrace the Christian name; yet it is unquestionable fact that these people remain exposed to all the horrors inseparable from this iniquitous commerce."). See also Douglas W. Kmiec, *Military Tribunals Are Necessary In Times of War*, WALL ST. J., Nov. 15, 2001, at A26 ("Terrorism is not ordinary crime within an ordered society. It is the indiscriminate killing of innocents and the destruction of property. As such, it is the quintessential crime against humanity; it is not a social or cultural dysfunction capable of rehabilitation or rectification by means of ordinary law enforcement and prosecution.").

147. See Rafael Tammariello, *The Slave Trade: Slavery*, LAS VEGAS REV. J., FEB. 08, 1998, [http://lvvj.com/lvrj\\_home/1998/Feb-08-Sun-1998/opinion/6918250.html](http://lvvj.com/lvrj_home/1998/Feb-08-Sun-1998/opinion/6918250.html) (last visited Nov. 26, 2000).

The British South Sea Company founded in the early 1700s as an officially sanctioned monopoly to furnish African slavers to Spanish American empire claimed some notable shareholders. Among those holding slave stocks were Sir Isaac Newton, formulator of the law of gravity; Jonathan Swift, the great Irish-born satirist; the [E]arl of Halifax, founder of the bank of England; Daniel Defoe, author of '*Robinson Crusoe*' not to mention numerous '*royals*.' *Id.*

148. See Steve Lubet, *Haven't We Fought This Battle Before?*, CHI. TRIB., Nov. 4, 2001, at 21.

[A]rguably, the slave trade could not be suppressed without the cooperation of nations such as the United States, France, Spain and Portugal. The paradox, of course, was that several of these countries depended on the slave trade for revenue and colonial labor. Thus the British spent decades attempting to bring the 'sponsors of slavery' into a grand anti-slaving coalition. *Id.*

See also Robert Joiner, *What's The Interest On 40 Acres And A Mule?* ST. LOUIS POST-DISPATCH Aug. 30, 2001, at B7 (" [A] team of lawyers is expected to sue the government for slavery and for black codes and other state-sponsored terrorism that curtailed the rights of African-Americans after emancipation."); HUGH THOMAS, *THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE — 1440-1870*, 372-373 (N.Y.: Simon and Schuster, Inc. 1997) (chronicling the involvement of some African chieftains in the trade).

149. See, e.g., Jim Meenan, *Clinton: Terrorists Misjudged America*, SOUTH BEND TRIB., Oct. 12, 2001, at A1 (reporting that "Former President Bill Clinton entered the Mendel Center at Lake Michigan College. . . [and delivered a] reality check in response to the Sept. 11 terrorist attacks. Clinton reminded the crowd of just how long terrorism [has] been around [;] that America itself had used it against slaves and American Indians."); Walter Russell Mead, *Extreme Measures*, WASH. POST, Jul. 25, 1999, at X6.

The treatment of "militias" and other violent right-wing fringe groups in the United States doesn't fully engage the long history of American terrorism based on squirrely political ideas and religiously justified notions of white supremacy. Groups like the Ku Klux Klan

during and after the transportation of millions of slaves to America, the Caribbean and the West Indies.<sup>151</sup>

Before slave voyages and within the interior of Africa, traders adopted cold-blooded measures to control men, women and children who refused to be enslaved for profits. Some eyewitness reports, for example, revealed that traders beat their captives inhumanely until scabs and wounds appeared on the slaves' bodies and, at other times, until death.<sup>152</sup> Even after death, traders continued to brutalize the victims. Rather than burying the corpses, the terrorists simply threw the decedents' bodies "into some [random] place, to be devoured by birds, or beast of prey."<sup>153</sup>

Eyewitnesses also reported other horror stories about the treatment of captives before they reached the ships: slave traders often raped and terrorized women and young girls, especially when the latter refused "to offer themselves 'willingly.'"<sup>154</sup> And, after slavers invaded peaceful villages, they tore children from the arms of parents, tethered the children

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have a long record of using terror as a political weapon; thousands of African Americans were lynched in this country. This was surely terrorism [...] *Id.*;

Ross K. Baker, *Terrorism Is Actually an Old Story in America*, *NEWSDAY*, Sept. 3, 1996, at A33.

The period immediately preceding the Civil War witnessed a level of savagery among whites that was unparalleled. Terrorism was employed in Kansas in the late 1850s both by those seeking to claim the state for slavery and those seeking to admit Kansas to the Union under a free-state constitution. Again, the logic of the terrorist was indiscriminate slaughter to induce fear in others. *Id.*

150. See Lubet, *supra* note 148, at 21.

[S]lavers acted privately, in the sense that they were not employed or directed by any nation. Each slave ship can be thought of as a separate cell, indeed a floating cell, only loosely tied to a central authority. The slave trade was, in fact, a vast, international, criminal network —supported and encouraged by many states, but acting independently of any government. *Id.*

151. See CLARK, *supra* note 144, at 24 (noting that "Mr. Wilberforce added: 'Never was there a system so replete with wickedness and cruelty. To whatever part of it we turned our eyes, whether to Africa, the middle passage, or the West Indies, we could find no comfort, no satisfaction, no relief.'").

152. See THOMAS, *supra* note 148, at 382. "Slaves were harshly treated in Africa [M]ost of them were 'severely and barbarously treated by their master. [Merchants] transported their slaves by means of the yoke if a so-called *bois mayombe*, by which, if the slave pulled, the supervisor could tug and choke, even strangle the slave." *Id.*

153. *Id.*

154. See JOHN W. BLASSINGAME, *THE SLAVE COMMUNITY*, 154-155 (Oxford University Press, New York 1979) (noting that "Generally speaking, the women were literally forced to offer themselves 'willingly' and receive a trinket for their compliance rather than a flogging for their refusal and resistance. Slave traders frequently engage in [this] kind of practice.").

together by the neck, placed them on ships, and subjected them to all of "the horrors of the *middle passage*."<sup>155</sup>

What were the conditions on board slave ships? Simply put, they were extensive and terrorizing. First, traders "branded" the slaves.<sup>156</sup> Then crewmembers secured each slave to "about four square feet" of space, an amount considerably less than the "twelve square feet per person in [the economy class on a Boeing 747 airliner]."<sup>157</sup> Also, during long voyages, a substantial number of captains "stowed slave directly on water casks covered with hides or mats."<sup>158</sup> Consequently, diseases and mortality were extremely high among both adults and children.<sup>159</sup> Furthermore, traders drove many slaves to commit suicide.<sup>160</sup> But even more egregious, crewmembers terrorized slaves by whipping<sup>161</sup> and throwing them overboard<sup>162</sup> for various reasons. Perhaps, the best description of the activities on the ships is this one: "There was misery, unending misery [and terror everywhere]."<sup>163</sup>

Without a doubt, terrorism for profit continued even after the slave ships arrived in America, the Caribbean and the West Indies. Traders employed a variety of unspeakable punishments to prevent escapes, major insurrections or any semblance of an uprising. One English gentleman described the systematic terrorism this way: "slaves were kept in a

155. See CLARK, *supra* note 144, at 20 (emphasis in the original). See also the accompanying footnote on page 20.

156. See BASIL DAVIDSON, *THE AFRICAN SLAVE TRADE* 13 (Boston: Little, Brown & Co. 1980) (During the later stage of the slave trade in the nineteenth centuries, an Englishman went on board the *North Star*, a slave ship, and discovered "the familiar horrors of the Middle Passage." He saw 505 men and women who "were all branded like sheep, with the owners' marks. [They] were impressed under breasts, on arms, and burnt with a red hot iron [.]")

157. See DAVID ELTIS, *ECONOMIC GROWTH AND THE ENDING OF THE TRANSATLANTIC SLAVE TRADE* 136 (New York: Oxford University Press 1987).

158. *Id.* at 136.

159. *Id.* at 136-137 (stating that "[S]lave-trade mortality was as high or higher in the nineteenth century that it had been in earlier centuries. [And] mortality was always higher in the slave trade than in other [involuntary and voluntary] long-distance traffic. Children were particularly susceptible to the diarrheal diseases which accounted for most deaths on board ship[s]").

160. See CLARK, *supra* note 144, at 23 (A ship surgeon reported: "[M]ost of the slaves labored under a fixed melancholy. [M]any [tried] to destroy themselves, and [some did].").

161. See *Id.* ("Others obstinately refused to take sustenance; and when the whip, and other violent means were used to compel them to eat, they looked up into the face of the officer and said with a smile: 'Presently we shall be no more.'").

162. See, e.g., *Gregson v. Gilbert*, 99 Eng. Rep. 629 (1783); DAVIDSON, *supra* note 156, at 13 (Boston: Little, Brown & Co. 1980) ("[T]he crew [of the *North Star*] has thrown fifty-five [slaves] overboard during their seventeen days at sea [in 1829].").

163. See DAVIDSON, *supra* note 156, at 13.

state of terror.”<sup>164</sup> Traders nailed slaves to the ground and slowly burned them from their feet to their heads. On other occasions, slavers chopped off feet, whipped slaves until they were raw, poured scalding wax on their skins, and poured salt and pepper into slaves’ wounds.<sup>165</sup> More telling, these terroristic acts were not the most severe of the acts that traders and owners employed to maintain control and ensure financial success.<sup>166</sup>

Finally, even after the official end of the Atlantic slave trade and slavery, economic terrorism continued against newly freed slaves. This was very evident in the United States. After the Civil War, the Klu Klux Klan “used beatings, lynchings and harassment to reinstitute the old order”<sup>167</sup> in the South. But the long history<sup>168</sup> of the slave trade and its terrorism were not restricted to southern states. “The truth is that slavery existed all over the early United States. . . . With the exception of architectural style, a traveler to the slave-era farms of New England would have found them virtually indistinguishable from the slaveholding regions of the rural

164. See DANIEL P. MANNIX AND MALCOLM COWLEY, *BLACK CARGOES: A HISTORY OF THE ATLANTIC SLAVE TRADE—1518 TO 1865*, 53 (N.Y.: Viking Press, 1962) (“After a tour of the islands in 1688, Sir Hans Sloane reported that they were punished for major crimes [and] for [c]rimes of a lesser nature.”). *Id.*

165. *Id.*

166. *Id.* (“Sir Hans was not tender-hearted, for he adds: ‘These punishments are sometimes merited by the [b]lacks who are a very perverse [g]eneration of [p]eople and though they appear harsh, yet are scarce equal to some of their [c]rimes and inferior to what [p]unishment other European [n]ations inflict on their [s]laves in the East-Indies.’”). See also Pope-Hennessy, *supra* note 144, at 238 (noting that “[N]ewly arrived slaves often died from past ill-treatment on the Middle Passage, from the physical shock of plantation conditions, or from suicidal melancholia.”).

167. John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 BUFF. L. REV. 653, 682 (1994) (“Klansmen revived the practice of ‘nightriding[.]’ [That was] a form of terrorism which dated to the acts of antebellum overseers, who strove to confine slaves within their quarters at night through fear. . . .”); see also George Likourezos, *Sexual Harassment By A Public Official Gives Rise To A Section 1983 Claim: A Legal Argument*, 6 HASTINGS WOMEN’S L.J. 93, 94 (1995) (stating that, “After the Civil War, a growing wave of terrorism by the Ku Klux Klan threatened the rights of former black slaves. On March 28, 1871, in response to this terrorism, Rep. Samuel Shellabarger (R., Ohio) introduced a bill, which was later enacted as the Ku Klux Act of 1871.”).

168. See Cornell Lewis, *Seeing September 11th Through Eyes of African Americans*, THE HARTFORD COURANT, Oct. 8, 2001, at A15. “America terrorized African slaves and their descendants for 400 years; the beatings, lynchings and forced labor in Southern cotton fields were a form of terrorism. . . .” *Id.*; see also Andrew P. Morriss, *Returning Justice To Its Private Roots*, 68 U. CHI. L. REV. 551, 560 (2001) (reviewing BRUCE L. BENSON, *TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE* (1998)). “The history of vigilantism in the American South is primarily a history of campaigns of terror aimed at violating the rights of African-Americans in an effort to return them to a status of de facto slavery. Simply labeling terrorists as vigilantes, however, does not change their essential nature as terrorists.” *Id.*

South.”<sup>169</sup> Again, human misery and terrorism were everywhere; and, during the entire period, insurance companies aided and abetted those who practiced economic terrorism.<sup>170</sup> A more thorough discussion of insurers’ participation appears later.

PART II. COMMON-LAW AND STATUTORY PROHIBITIONS AGAINST  
“AIDING AND ABETTING” CRIMINALS, TORTFEASORS  
AND “TERRORISTS”

In the wake of the September 11th attacks on the World Trade Center and Pentagon, Attorney General Ashcroft proclaimed: “Lying or attempting to conceal information from federal investigators will not be tolerated. . . . We will spare no legal means to identify, locate and incapacitate terrorists and those who aid and abet their criminal activity.”<sup>171</sup> On another occasion, he asserted that the Justice Department would “[arrest and jail] suspected terrorists on minor criminal or immigration charges, [because] it is difficult for a person in jail or under detention. . . to aid or abet. . . terrorism [.]”<sup>172</sup> Then “[t]he attorney general stood before the Judiciary Committee and said that to criticize his anti-terrorism policies is to aid and abet the terrorists.”<sup>173</sup>

The latter proclamation generated a barrage of criticisms. Critics asserted that the Justice Department’s broad scheme to find and punish alleged aiders and abettors of terrorism is simply a pretext to assault the

169. Brent Staples, *Wrestling With the Legacy of Slavery at Yale*, N.Y. TIMES, Aug. 14, 2001, at A16.

Americans tend to believe that slavery was peculiar to the South and that the North, particularly the New England states, was ‘free’ This misbelief stems in part from mistaken ideas about the Civil War — the central metaphor of American popular history — and partly from the gargantuan reputations left by Northeastern abolitionists like Horace Greeley, William Lloyd Garrison and Harriet Beecher Stowe. It lingered in Greeley’s New York until 1827, and in Stowe’s Connecticut until the late date of 1848. *Id.*

170. *Id.* (“[An] archival insurance policies turned up showing that Aetna and other big firms had insured enslaved Africans for plantation owners in the Deep South. The language rendering the policies invalid when slaves were beaten to death or worked into the grave shows that the insurance companies knew exactly what they were into.”).

171. Jerry Seper, *Anthrax Cases Spread To NBC Affected Woman A Brokaw Aide*, WASH. TIMES, Oct. 13, 2001, at A1.

172. Jim McGee, *New Strategy Carries Risks, Officials Say*, MIAMI HERALD, Dec. 2, 2001, at 25A.

173. Jeffrey Page, *Are We Un-American If We Disagree With Ashcroft?*, RECORD (NORTHERN NEW JERSEY), Dec. 11, 2001, at L15 (“Some people fear the Attorney General of the United States, and his assertion to a Senate committee that to criticize his anti-terrorism policies is to give aid and comfort to the enemy. You don’t like my ways — and you say so? You must be for the other guy.”).



civil liberties of all Americans.<sup>174</sup> Some civil libertarians observed that the attorney general's broad measures would allow him to arrest and prosecute all persons, whom government officials "believed" were aiding and abetting terrorists.<sup>175</sup> Other critics stressed that the anti-terrorism measures would permit the government to arrest and detain suspicious persons indefinitely for allegedly aiding and abetting terrorism.<sup>176</sup> Without doubt, these apprehensions are not completely unfounded. The federal government has less than a stellar history of circumventing constitutional rights, ostensibly to identify, arrest and punish suspects for aiding and abetting terrorists.<sup>177</sup>

Then again, it is highly appropriate for the government and, even, private entities to identify, pursue, locate and punish those who aid and abet terrorists. It appears, however, that the attorney general's failure to define "aiding and abetting" caused many to question the government's anti-terrorism policies and efforts. There are two plausible reasons for the verbal assaults. First, a universal definition of "aiding and abetting" has not surfaced among laypersons. Second, aiding and abetting liability appears in at least two flavors under common law. Therefore, in light of those circumstances, some general confusion about the identities of the

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174. See, e.g., *Battle over Rights a Balance of Power*, MIAMI HERALD, Dec. 10, 2001 at 6B.

[I]t seems that in Mr. Ashcroft's vision, Americans would accept meekly and without question all that he and the president do in the name of fighting terrorism. . . . More insidious, though, is the attorney general's suggestion that those who fight for protection of civil liberties somehow are aiding and abetting terrorists. . . . What the attorney general seems to forget, however, is that it is the people who govern. He is the people's representative, vested with the power to do their bidding, not the government itself. *Id.*

175. See, e.g., George Lardner Jr., *Legal Scholars Criticize Wording Of Bush Order—Accused Can Be Detained Indefinitely*, WASH. POST, Dec. 3, 2001, at A10.

'The order is rife with constitutional problems and riddled with flaws,' said Laurence H. Tribe, professor of constitutional law at Harvard. He said its reach is so sweeping that it could snap up not only terrorist leaders caught overseas but also any resident immigrant who is 'believed' to have 'aided or abetted. . . acts in preparation' for international terrorism. *Id.*

176. See, e.g., *Special Courts for Terrorism Cases*, DENVER POST, Nov. 14, 2001 at A27. Stepping up the legal war against terrorism, President Bush issued a broadly worded order that allows the use of special military courts to try suspected foreign terrorists, whether they are picked up in other countries or in the United States. The order does not apply to U.S. citizens, but it could apply to foreigners detained in the United States on suspicion of committing terrorist acts or even 'aiding and abetting' terrorists [.] *Id.*

177. See, e.g., *Terrorism or Advocacy?* WASH. POST, Aug. 9, 1992, at C6. Rejecting the old McCarthy era notions of subversive speech, Congress ruled that simple advocacy cannot be punished. Terrorism or aiding and abetting that crime is justifiably still an excludable offense, so the government in seeking to deport the eight has now changed the charges. Thus they have been charged with 'engaging in terrorist activity' by 'soliciting funds. . . and [members] for a terrorist organization.' *Id.*

aiders and abettors should be expected. Below a brief discussion of aiding and liability theory appears to help remove some of the confusion.

### A. *Criminal Liability for Aiding and Abetting*

Generally, from a layperson's perspective, "abet" simply means to encourage a particular activity while, "aid" means to provide another with whatever is useful or necessary to achieve an end.<sup>178</sup> Therefore, it is very common for laypersons to allege that one individual aided and/or abetted a third party to plan or execute legitimate or illegitimate conduct.<sup>179</sup> However, before one can be criminally liable for aiding and abetting, the government must prove it in court.

As early as the thirteenth century, Bracton reported that a person who aided and counseled a criminal was criminally liable himself.<sup>180</sup> However, English courts refined the doctrine in succeeding centuries. For example, in 1553, the court in *Crown Matters Happening at Salop*<sup>181</sup> held: absent "malice pretense," an individual could not be liable for first-degree murder, even if he aided and abetted a murderer at the scene of the crime. Instead, the abettor would only be liable for manslaughter.<sup>182</sup> Nearly one and a half-centuries after *Salop*, another English court significantly narrowed the doctrine. In *Rex v. Plummer*,<sup>183</sup> the court ruled that

178. See, e.g., MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, TENTH EDITION.

179. See, e.g., Brian J. Redding, *The Law Firm of the Future: an Ethics and Malpractice Perspective*, 70 TEMP. L. REV. 1253, 1253-1255 (1997).

[Lawyers'] biggest problems are the representation of unworthy clients [and] the conflict of interest rules, [leading to liability]. What does this 'model' claim look like? It's a business transaction in which our firm's client is sued for fraud, misrepresentation, [and] breach of fiduciary obligation. The allegation is that the client engaged in wrongdoing and then the lawyer is sued and I'm using this term as a layman, [for] aiding and abetting the client's wrongdoing. Now I said I was using that term as a layman [because] the Supreme Court abolished the aiding and abetting cause of action under Rule 10(b)(5). *Id.* See *Central Bank of Denver v. First Interstate Bank of Denver* 114 S.Ct. 1439 (1994) (noting Justice Kennedy, the Supreme Court held that a private plaintiff may not maintain an aiding and abetting suit under the Securities Exchange Act §§ 10(b).).

180. See, e.g., HENRY DE BRACTON, 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND — 1210-1268, 334, at <http://supct.law.cornell.edu/bracton/Common/index.html> (last visited Apr. 1, 2002) (stating that, "The crime of lese-majesty takes many forms, one of which is where one rashly compasses the king's death, or does something or arranges for something to be done to the betrayal of the lord king or of his army, or gives aid and counsel or assent to those making such arrangements, even though what he has in mind is not carried into effect.") (emphasis added).

181. *Matters Happening at Salop*, 75 Eng. Rep. 152 (1553).

182. See *Id.* at 153 (noting, "If divers intend to murder a man, and another enters in the affray suddenly, without malice pretense, and kills the person, this is not murder but manslaughter. [A]lthough they, who were present and abetting, were principals as well as they, who struck the man and killed him, yet they are principals in the second degree.").

183. See generally *Rex v. Plummer*, 84 Eng. Rep. 1103 (1701).

liability could not attach for murder where an alleged aider and abettor agreed to participate in criminal activities, but had no knowledge of the murderer's intent to kill a third party.<sup>184</sup> There is one final point: under English criminal statutes, a person is also liable for aiding and abetting if that individual persuades or lends resources to another who commits a crime.<sup>185</sup>

Of course, the criminal aiding and abetting doctrine in America evolved out of English common law; and a version of the doctrine appears in every state.<sup>186</sup> The Texas rules fairly represent those found in other states. As early as 1857, the Texas Supreme Court held that a defendant is not criminally liable for aiding and abetting, even if the defendant was present when a third party committed a crime and the defendant made no effort to prevent the crime.<sup>187</sup> Alternatively, an indi-

184. See *Id.* at 1105.

Then the question will be, whether the rest of his accomplices shall be adjudged to be principals to him, as aiders, abettors or assisters to that murder. And we all held that they would not be principals: for though they are all engaged upon an unlawful act, and while they were actually in it, this murder is committed by one of the company so engaged [...] yet it does not appear to be done in prosecution of that unlawful act, but it may be upon another account, and those who are in the unlawful act, not knowing of the design that killed the other his companion cannot be guilty of it. First, the abettor must know of the malicious design of the party killing [...] *Id.*

185. See, e.g., *Regina v. Whistler*, 88 Eng. Rep. 860, 861 (1703).

The question was, whether the defendant was an aider and abettor. . . within the intent and meaning of the statute [...] and, whether, if the words 'aiding and abetting' were not in the statute, the defendant would not be a principal [...] [I]f a man persuade to kill, and lend dogs and horses, and they are used accordingly, he is aiding therein. I think he is within the letter of the statute; he is 'an aider therein' as much as if he were present at the fact. *Id.*

186. See, e.g., *People v. Turner*, 195 P.2d 809, 816 (Cal. Ct. App. 1948)

[O]ne who [is not] the principal actor, but who assists in the commission of a crime, is regarded as a principal. One may aid or abet in the commission of a crime without having previously entered into a conspiracy to commit a crime. [T]he mere presence alone of an accused at the scene of a homicide is not sufficient to make him a participant. *Id.*;

*Lamb v. People*, 96 Ill. 73, available at, 1880 WL 10078 \* 5 (Ill. 1880)

Where the accused is present and commits a crime with his own hands, or aids and abets another in its commission he may, in either case, be considered as expressly assenting thereto. . . . [But] if the accused in such case has not expressly assented to the commission of the crime, . . . there can be no implied assent, and consequently no criminal liability. *Id.*; *People v. McKane*, 38 N.E. 950, 951 (N.Y. 1894)

A person concerned in the commission of a crime, whether he directly commits the act constituting the offense, or aids or abets in its commission, and, whether present or absent, and a person who directly, or indirectly, counsels, commands, induces or procures another to commit a crime, is a principal. *Id.*

187. See *Burrell v. The State*, 18 Tex. 713, (1857).

Although a man be present whilst a felony is committed, if he take no part in it and do not act in concert with those who committed it, he will not be a principal merely because he did not endeavor to prevent the felony or apprehend the felon. Whether he was aware of the

vidual would be liable if the state proves 1) he was present when a third party committed a crime, and 2) he participated in the criminal activity, or encouraged the third party to commit the crime.<sup>188</sup> Congress also has embraced these English principles and enacted them under a criminal aiding and abetting statute.<sup>189</sup>

### B. *Civil Liability for Aiding and Abetting*

An individual can also be civilly liable for aiding and encouraging another individual to commit a tort. Many states<sup>190</sup> have embraced the general principle outlined in the Restatement of Torts § 876, which reads in relevant part: "[O]ne is subject to liability if he (a) does a tortious act in concert with [another person]. . . , or (b) knows that the [other person's] conduct constitutes a *breach of duty* and gives substantial assistance or encouragement to the other [person]. . . , or (c) gives substantial assistance to the other [person] in accomplishing a tortious result and his own conduct. . . constitutes a *breach of duty* to the third person."<sup>191</sup>

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intention of his companion and participated in it, is the fact to be proved in order to implicate him in the criminality of the act. *Id.*

188. *See* Wood v. State, 11 S.W. 678, 679 (Tex. Ct. App. 1889).

In our opinion the court should have instructed the jury that, if Blackshear did the killing, and defendant was present, but did not know the unlawful intent of Blackshear, and did not aid him by acts, or encourage him to commit the act, that then his bare presence would not make him in any manner liable for the act. *Id.*

189. 18 U.S.C. § 2 (a) (2001). It states: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." *Id.*

190. Although many jurisdictions have recognized civil liability for aiding and abetting in some circumstances where there is proof of "substantial assistance," not all have formally adopted Restatement (Second) of Torts § 876 (b). *See* Cobb v. Indian Springs, Inc., 258 Ark. 9, 522 S.W.2d 383, 387 (1975); Carney v. DeWees, 136 Conn. 256, 70 A.2d 142, 146 (1949); Bierzynski v. Rogers, 239 A.2d 218, 221 (Del.1968); Smith v. Thompson, 103 Idaho 909, 911, 655 P.2d 116, 118 (App.1982); Farmer v. City of Newport, 748 S.W.2d 162, 164 (Ky.Ct.App.1988); Barnes v. McGough, 623 A.2d 144, 145 (Me.1993); Haddock v. Stewart, 232 Md. 139, 192 A.2d 105, 107 (1963); Nelson v. Nason, 343 Mass. 220, 177 N.E.2d 887, 888 (1961); Sloan v. Fauque, 239 Mont. 383, 784 P.2d 895, 896 (1989); Boykin v. Bennett, 253 N.C. 725, 118 S.E.2d 12, 16 (1961); Rael v. Cadena, 93 N.M. 684, 604 P.2d 822, 822-23 (App.1979); Kuhn v. Bader, 89 Ohio App. 203, 101 N.E.2d 322, 327 (1951); Sprinkle v. Lemley, 243 Or. 521, 414 P.2d 797, 800 (1966); Solberg v. Johnson, 90 Or.App. 90, 750 P.2d 1190, 1192 (1988); Cecil v. Hardin, 575 S.W.2d 268, 272 (Tenn.1978); Price v. Halstead, 177 W.Va. 592, 355 S.E.2d 380, 386 (1987); Collins v. Eli Lilly Co., 116 Wis.2d 166, 342 N.W.2d 37, 46 (1984).

191. RESTATEMENT (SECOND) OF TORTS, § 876 (1977) (emphasis added).

Standing alone, section 876 is highly ambiguous, which explains in part why Texas<sup>192</sup> and other jurisdictions have not embraced it. Moreover, section 876 has generated less than stellar rulings.<sup>193</sup> In subsections (b) and (c), breach of duty appears. But there are two broad categories of torts — intentional and negligence-based violations.<sup>194</sup> However, duty

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192. For that and other reasons, the Texas Supreme Court has refused to embrace § 876 and create a civil cause of action for aiding and abetting. See *Juhl v. Airington*, 936 S.W.2d 640, 643-644 (Tex. 1996).

Subsection (a) of Restatement (Second) section 876 requires at least a tacit agreement to participate in some tortious act, done in furtherance of a common goal or plan, and which causes injury. This has common elements with common law civil conspiracy, long a recognized tort in this state. Because Airington's pleadings allege only that defendants were negligent, civil conspiracy and § 876(a) are not theories upon which he could have relied to support summary judgment. On the other hand, subsection (b) of Restatement (Second) section 876 imposes liability not for an agreement, but for substantially assisting and encouraging a wrongdoer in a tortious act. This subsection requires that the defendant have 'an unlawful intent, *i.e.*, knowledge that the other party is breaching a duty and the intent to assist that party's actions.' Even if we were to adopt subsection (b) of Restatement (Second) section 876 in Texas, Airington could not recover under its terms.") *Id.*

But see *Crescendo Inv., Inc. v. Brice*, 61 S.W.3d 465, 472 (Tex. App.—San Antonio 2001, pet denied).

Under the Texas Securities Act, to establish liability of an aider and abettor, a plaintiff must show the following: (1) a primary violation of securities laws occurred; (2) the aider had general awareness of its role in this violation; (3) the aider rendered substantial assistance in this violation; and (4) the aider either intended to deceive plaintiff or acted with reckless disregard for the truth of the representations made by the primary violator. *Id.*

193. *E.g.*, *Saunders v. Superior Court*, 7 Cal.App.4th 832, 846, 33 Cal.Rptr.2d 438, 446 (1994).

Liability may also be imposed on one who aids and abets the commission of *an intentional tort* if the person (a) knows the other's conduct constitutes *a breach of duty* and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes *a breach of duty* to the third person. (emphasis added) *Id.*

194. Some suggest there are three broad categories of torts — intentional, negligence-based and strict liability, including products liability. See JOHN WADE, VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID PARTLETT, PROSSER, WADE SCHWARTZ'S CASES & MATERIALS ON TORTS, 16 (Foundation Press 1994) ("[N]ote merely that there are three possible bases of tort liability: a) intentional conduct; b) negligent conduct which creates an unreasonable risk of causing harm; and c) conduct which is neither intentional nor negligent but which subjects the actor to strict liability because of public policy."). But upon a closer analysis, there are only two broad classes of tort liability — one based on intent and the other on a breach of duty. See, *e.g.*, *Hanus v. Texas Utilities Co.*, 71 S.W.3d 874 (Tex. App.—Fort Worth 2002, no pet.) (stating that, "The Texarkana court has also recognized that the exceptions to the duty to warn that originated in negligence law have been applied to strict liability claims 'on the theory that there is no doctrinal distinction between negligence and strict liability failure to warn actions under the Restatement.'"), and *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 289 (Iowa 1994) ("After reviewing the authors and comments on the failure to warn question, we believe any posited distinction between strict liability and negligence principles [in warnings cases] is illusory.").

and breach of a duty are not elements of any intentional tort. Therefore, some state courts have had to resolve the ambiguity and clearly state when civil liability should attach for aiding and abetting. For example, Connecticut's and Ohio's rules are broad, covering both intentional and negligent conduct. In both jurisdictions, a plaintiff must plead and prove that a defendant 1) helped the principal tortfeasor to commit a wrongful act that caused the injury, 2) understood his role when he provided the assistance, and 3) knowingly and substantially assisted the principal tortfeasor.<sup>195</sup>

On the other hand, Arizona's and Colorado's rules appear to be more restrictive, allowing recovery only where an alleged secondary tortfeasor aided and abetted the principal tortfeasor's negligent conduct. In Arizona, a third-party plaintiff can recover only when she establishes that "1) the primary tortfeasor [committed a tort that injured] the plaintiff, 2) the defendant . . . [knew] the primary tortfeasor's conduct [was] a breach of duty, and 3) the defendant . . . substantially assist[ed] or encourage[ed] the . . . breach."<sup>196</sup> In Colorado, the elements are slightly different. A complaint must prove that defendant 1) breached a fiduciary duty, 2) knowingly participated in the breach, 3) caused damages, and, 4) gave substantial assistance to the principal tortfeasor.<sup>197</sup>

In jurisdictions that recognize a civil action for aiding and abetting, the injured third party must prove that the secondary tortfeasor gave "substantial assistance" to the principal tortfeasor. Although state and federal courts have not adopted a universal standard for measuring "substantial assistance," most have embraced the factors suggested in a comment to the Restatement of Torts § 876.<sup>198</sup> Specifically, the third-party victim must present probative evidence of the following: 1) the type of encour-

195. *Calore v. Town of Stratford*, 2001 WL 58364, \*5 (Conn. Super. 2001).

To sustain a cause of action for aiding and abetting, the pleading party must plead and prove the following elements: (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of the overall illegal or tortious conduct at the time that he provides assistance; and (3) the defendant must knowingly and substantially assist the principal violation. *Id.*; *Guerrero v. C.H.P. Inc.*, 2001 WL 931640, \*3 (Ohio Ct. App. 2001).

196. *Wells Fargo Bank v. Ariz. Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d 12, 23 (Ariz. 2002).

197. *See Nelson v. Elway*, 971 P.2d 245, 249-250 (Colo. App. 1998).

A claim of aiding and abetting a breach of fiduciary duty is not identical to a claim of civil conspiracy. The elements [for] aiding and abetting a breach of fiduciary duty include: 1) breach by a fiduciary of a duty owed to a plaintiff, 2) a defendant's knowing participation in the breach, and 3) damages . . . . Also, RESTATEMENT (SECOND) OF TORTS § 876(b) (1970), upon which the tort is premised, includes as an additional element that a defendant must give "substantial assistance to the other's breach. *Id.*

198. RESTATEMENT (SECOND) OF TORTS § 876(b), comment d (1979).

agement offered to the principal,<sup>199</sup> 2) the amount and kind of assistance given to the primary wrongdoer,<sup>200</sup> 3) the alleged abettor's presence when the primary tortfeasor committed the tort,<sup>201</sup> 4) the alleged abettor's relation to the primary tortfeasor; 5) the alleged abettor's state of mind when he gave assistance, and 6) the duration of the assistance.<sup>202</sup> Finally, it is important to stress: "substantial assistance can be distant in time and location from the primary wrongdoing."<sup>203</sup>

### PART III. A BRIEF OVERVIEW: THE EVOLUTION OF ALL-RISKS MARINE INSURANCE AND THE REGULATIONS OF INSURERS IN BRITAIN AND IN AMERICA DURING THE TRANSATLANTIC SLAVE TRADE

Part IV presents a comprehensive discussion of British and American insurers' roles as principals in and aiders and abettors of the transatlantic slave trade and the accompanying terrorism. However, one is less likely to appreciate the substantial scale of insurers' assistance without first understanding the evolution and purpose of marine insurance. In fact, a general comprehension of the "business of insurance" and the "business of insurers"<sup>204</sup> would help to explain 1) insurers' decision to become principal players in the slave trade without remorse, guilt or repentance—even though the slave trade was an illegal enterprise,<sup>205</sup> and 2) underwrit-

199. See, e.g., *Rael v. Cadena*, 93 N.M. 684, 604 P.2d 822 (1979) (finding civil aiding and abetting liability for verbal encouragement at the scene of a battery).

200. See also *Cobb v. Indian Springs, Inc.*, 258 Ark. 9, 522 S.W.2d 383,387 (1975) (finding liability where a security guard allegedly urged a younger motorist with a new car to "run [the car] back up here and see what it will do."). But see *Aetna Casualty and Surety Co. v. Leahey Const. Co.*, 219 F.3d 519, 537 (6th Cir. 2000) (finding that the routine extension of a loan does not amount to substantial assistance under Ohio's aiding and abetting law).

201. Patrick J. McNulty and Daniel J. Hanson, *Liability For Aiding and Abetting By Silence or Inaction: An Unfounded Doctrine*, 29 TORT & INS. L.J. 14, 19-20 (1993).

Neither mere presence of the defendant at the commission of the wrong nor failure to object to it is sufficient to impose legal responsibility for aiding and abetting. Because there generally is no duty to take steps to interfere in tortious activity or speak up to discourage it, action is a necessary predicate for substantial assistance; silence or inaction is legally insufficient. *Id.*

202. *Halberstam v. Welch*, 705 F.2d 472, 481-82 (D.C. Cir. 1983) ("Suggestive words may also be enough to create joint liability when they plant the seeds of action and are spoken by a person in an apparent position of authority.").

203. Ronald M. Lepinkas, *Civil Aiding and Abetting Liability in Illinois*, 87 ILL. B.J. 532, 533 (1999).

204. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210-211 (1979) ("It is important, therefore, to observe at the outset that the statutory language in question here does not exempt the business of insurance companies from the scope of the antitrust laws. The exemption is for the 'business of insurance,' not the 'business of insurers.'").

205. See *infra* notes 451-473 and the accompanying text.

ers' decision to continue to aid and abet slave traders' terrorism— even after insurers decided to end their direct participation in that enterprise.

But more important, one also must appreciate the state of insurance regulation in England and in America during the mid-sixteenth to the early-nineteenth centuries. This is fairly critical, if one wants to understand why insurers participated— as principals, aiders and abettors— in the horrors of the slave trade for nearly three centuries with impunity. This part, therefore, explores the evolution, purpose and use of “all risk” marine insurance contracts; and it also presents a general overview of insurance regulation in Britain and America during the transatlantic slave trade.

#### A. *Evolution of “All Risk” Marine Insurance and Its Role in the Transatlantic Slave Trade*

Insuring one's property or enterprise against natural and man-made perils is a very ancient practice. Marine insurance is the oldest type of insurance, and one of the earliest forms of property and indemnity insurance. It began around 3,000 BC when Chinese merchants insured themselves “against trade losses by distributing the cargo of one merchant over many boats.”<sup>206</sup> This involved the well-known and current-day practices of risk transference and risk distribution.<sup>207</sup> To be sure, insurance was a significant development in maritime commerce; it allowed and encouraged merchants to invest money and assume risky enterprises with some assurances that others would help in the event of serious losses.

Marine insurance, however, did not start as a highly commercial, for-profit enterprise. Rather, it began as a non-profit, mutual-help association.<sup>208</sup> Under the latter, merchants formed small guilds, established

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206. See Mohd Tarmidzi, *Chapter 5: What Is Insurance?* INTRODUCTION TO ISLAMIC INSURANCE (Malaysian Insurance Institute: EBook), at [http://www.insurance.com.my/zone\\_takaful/takaful](http://www.insurance.com.my/zone_takaful/takaful) (last visited Dec. 1, 2003). See also *History of Auto Insurance: History of Concept of Car Insurance*, at <http://www.autocarinsurancequotes.com/history.html> (last visited Dec 1, 2003)(stating “[m]arine insurance is as old as marine trade and [dates] back to 3000 BC. Early merchants trading on China's rivers practiced a form of loss control by deliberately spreading a given cargo among several vessels, thereby reducing the potential loss.”).

207. See *Helvering v. Le Gierse et al.*, 312 U.S. 531, 539 (1941) (asserting that “[h]istorically and commonly insurance involves risk-shifting and risk-distributing.”). But see *W.S. Badcock Corp. v. Myers*, 696 So.2d 776, 782 (Fla. Dist. Ct. App. 1996) (claiming “[r]isk transference and risk distribution are basic characteristics of most insurance transactions. Since these characteristics are present in many other arrangements that are not viewed or treated as insurance, the determination of what constitutes insurance usually is predicated on additional factors or considerations.”).

208. Tarmidzi, *supra* note 206 (“One thing is clear is that in the early years, insurance was not a commercial venture but more of a mutual help scheme on a non-profit basis.”).



pools of reserves and made equitable contributions to those pools to cover potential losses. Perhaps the earliest form of for-profit "quasi-insurance"<sup>209</sup> evolved in Babylon around 2250 BC.<sup>210</sup> It was called bottomry; under a bottomry contract, a ship owner borrowed money to finance voyages. To pay for the use of a lender's money and the risk of losing it, a ship owner paid an exorbitant amount of interest. However, if the ship was totally lost, the owner did not have to repay the loan. Instead the lender assumed the burden of the loss.<sup>211</sup>

The modern premium-insurance contract first appeared in Italy during late fourteenth century."<sup>212</sup> Under a premium contract, commercial and

See also J. P. VAN NIEKERK, *THE DEVELOPMENT OF THE PRINCIPLES OF INSURANCE LAW IN THE NETHERLANDS FROM 1500-1800*, at 3 (Juta & Co. 1998) (noting that, "There is general acceptance of the fact that insurance on a profit basis as opposed to insurance on a mutual basis, was unknown to antiquity in general.").

209. Early on, there was general disagreement over whether bottomry contracts were precursors to insurance contracts or whether they are indeed "true" contracts of insurance. The present and prevailing view is that the two are not the same. *E.g.*, NIEKERK, *supra* note 208, at 49-51.

[I]t has been said that insurance is a form of bottomry; that bottomry is a form of insurance; that bottomry and insurance are twin sisters with the former having the rights of primogeniture; that bottomry is mixed contract of loan and insurance; and that even bottomry is the reverse of insurance. The principal common characteristic [between both is] the transference of risk effected by and between the parties to the respective contracts. [There are] great and fundamental differences between the contracts of bottomry and insurance." *Id.*

210. See Scott A. Taylor, *Taxing Captive Insurance: A New Solution For An Old Problem*, 42 Tax Law. 859, 933 n. 11(1989). Scholars are in some disagreement over the earliest appearance of these contracts. Compare I. Pfeffer, *Essays On Insurance History* 4 n.11 (1966) (unpublished manuscript available in the Library of the College of Insurance, New York City) (dating the practice at 1750 B.C.) with CHARLES FARLEY TRENNERY, *THE ORIGIN AND EARLY HISTORY OF INSURANCE* 46 (1926) (concluding that the practice began in 2250 B.C., some 500 years earlier). Professor Taylor also made the following observation: "The dispute hinges on the dating of the Code of Hammurabi. This code is named after the Babylonian King Hammurabi, who is known chiefly for his codification of law, the text of which archaeologists found on a stone monument in Susa in 1902. *Id.*

211. *Thomson v. Royal Exchange Assurance Co.*, 105 Eng. Rep 11, 12 (1813). Chief Justice Lord Ellenborough declaring:

The distinction between an insurance and [bottomry] is simple: [I]n the former case if the voyage [is] lost, or not worth pursuing the assured may abandon and claim as for a total loss; [B]ut in the latter case nothing short of an actual total loss will discharge the borrower of money upon bottomry. I have had occasion to state this distinction as established law; that in the case of bottomry nothing short of a total destruction of the ship will constitute an utter loss. *Id.*

212. See THE AUSTRALIAN LAW REFORM COMMISSION, *THE HISTORY OF MARINE INSURANCE LAW*, at <http://www.austlii.edu.au/au/other/alrc/publications/reports/91/ch5.html> (last visited Dec. 1, 2003) (claiming [t]he first premium-based insurance policies covering sea traffic appear to have been developed in Italy by the Lombards in medieval times." ). See also Todd Roehrig and Trevan Nelson, *History of Marine Insurance*, at <http://>

maritime merchants transferred some or all the risks of during business to insurers for a predetermined premium. When the insured experienced a total or a partial loss of ships and cargo, the insurer indemnified or reimbursed the insured for his losses.<sup>213</sup> For centuries, marine insurance for profit was the predominant form of insurance. "From Italy the insurance contract . . . spread with trade to other parts of Europe . . . [and by] the mid-fifteenth century, the insurance contract in its modern form had become so widely known . . . that it attracted the attention of [courts, legislatures and jurists]."<sup>214</sup>

More important, the for-profit marine insurance contract had been in use for at least two centuries when John Hawkins commenced his first slave voyage in the mid-sixteenth century with the support and blessing of Queen Elizabeth I.<sup>215</sup> In addition, at the very height of the transatlantic slave trade,<sup>216</sup> marine insurance played an indispensable role in maritime

[www.acs.ualgary.ca/mgmt/inrm/industry/marine/hist.html](http://www.acs.ualgary.ca/mgmt/inrm/industry/marine/hist.html) (last visited April 28, 2002) (relating that "[t]he first marine insurance policy was introduced in 1384 in an attempt to cover bales of fabric traveling to Savona from Pisa, Italy").

213. *E.g.*, *Kemp v. Halliday*, 122 Eng. Rep. 1361, 1370 (1866) ("A contract of marine insurance is a contract to indemnify against loss by certain perils, and if the subject matter of the insurance is totally lost in consequence of those perils, the assured is entitled to recover as for a total loss; if it is only partially lost, the assured is Only entitled to recover for a partial loss.").

214. J. P. VAN NIEKERK, I *THE DEVELOPMENT OF THE PRINCIPLES OF INSURANCE LAW IN THE NETHERLANDS FROM 1500-1800*, 7 (Juta & Co. 1998).

215. *Buccaneers, Privateers & Swashbucklers — Captain Sir John Hawkins*, at <http://www.vleonica.com/hawkins.html> (last visited Aug. 17, 2001).

Hawkins spent the years 1562 through 1568 making four voyages. It was during these voyages that he was the first English slaver and the first Englishman to invade the Caribbean, which was largely of Spanish possession. Hawkins started his career as smuggler. Slave smuggling was extremely profitable at the time as Spain required all slavers to register their cargo at Seville and Spain would take a portion of the proceeds thereby inflating the price. In October 1562, Hawkins took 3 small ships to Sierra Leone. His purpose was to raid native villages (collecting slaves), and loot Portuguese ships . . . *Id.*

216. *See Exploring Amistad at Mystic Seaport — Timeline: The Atlantic Slave Trade* at <http://www.stkitts.co.uk/slavery.htm> (last visited Aug. 17, 2001) (noting that the seventeenth century, "1640-1680 [marks] the beginning of large-scale introduction of African slave labor in the British Caribbean for sugar production"); *The Trans-Atlantic Slave Trade* at <http://africanhistory.about.com/library/weekly/aa080601a.html> (last visited May 10, 2002) (citing that at it height in the 18th century (1701-1800), approximately 6,090,000 slaves were transported from Africa to worldwide destinations). *See also* Raymond T. Diamond, *No Call To Glory: Thurgood Marshall's Thesis on the Intent of a Pro- Slavery Constitution*, 42 VAND. L. REV. 93, 101-102 (1989).

England's mainland colonies had developed a long history of slavery. The first blacks arrived in Virginia in 1619, before blacks had arrived in Massachusetts, and although Virginia's legislature and courts would deal on a piecemeal basis with problems occasioned by the existence of slavery, it was not until 1680 and 1682 that the colony passed its first slave codes. *Id.*

commerce. In fact, the massive and prolonged slave trade as well as the terrorism that it produced would not have occurred but for ship owners' and slavers' ability to purchase marine insurance. The financial risks and potential losses associated with voyages from England to Africa and then to the Americas were just too great.<sup>217</sup> Without a doubt, slavers needed insurance.<sup>218</sup>

Addressing that need created an unexpected development: the transatlantic slave trade generated a very large and prosperous insurance industry in England<sup>219</sup> and in America.<sup>220</sup> For example, in England, Lloyd's of London<sup>221</sup> the well-known financial institution opened its doors in 1688,

217. *E.g.*, JAMES A. RAWLEY, *THE TRANSATLANTIC SLAVE TRADE — A HISTORY* 186 (W. W. Norton & Co. 1981) (stating that, "Marine insurance against the 'perils of the sea,' with a special provision for possible slave revolts, was necessary to protect a venture.").

218. *E.g.*, ELTIS, *supra* note 157, at 197 (stating "As with any other large-scale, long-distance traffic, the slave trade was dependent on highly organized financial markets and supply facilities. [T]he need for financial services (e.g., credit and insurance) and for legal services to support claims and expedite transfers of assets were the *raison d'être* of ports the world over.").

219. *Cf.* *A Bristol Hero, True, But He Became Rich Through Slave Trade— City Starting To Acknowledge How It Became Wealthy*, THE SAN DIEGO UNION & TRIB., Sep. 20, 1998 at A30 available at 1998 Westlaw 20048593.

More than 2,000 slave ships set out from Bristol [England] between 1698 and 1807. They sailed to West African destinations where they loaded up on average more than 250 slaves per ship. 'The economic legacy to Bristol is enormous,' Courtier said. Very few slaves were ever brought to Bristol, whose 9,000 or so black residents today are descended from later immigrants. But Bristol was a key slaving port and on the basis of that, and the industry that developed out of it, the city grew rich.' *Id.*;

Carl Schoettler, *Liverpool Confronts Role In Slave Trade*, BALTIMORE SUN, Dec. 9, 1994 at 1A available at 1994 Westlaw 6954850.

At Town Hall, the facade has sculpted heads of African peoples — silent reminders of the victims of the slave trade that once helped make this city rich. For 75 years, Liverpool merchants and seamen dominated the infamous trans-Atlantic commerce in human beings — until 1807, when Britain banned it. For the next half-century they traded in the cotton, tobacco and sugar that slave labor produced. The edifices erected with the profits of the slave trade still stand out in the cityscape, like dubious jewels on a homespun dress.' Liverpool was not just the economic capital of the slave trade, but the political capital as well [.]' *Id.*

220. *See, e.g.*, Oralandar Brand-Williams, *Author: Slavery Helped Create Wealth Gap*, THE DETROIT NEWS, Jul. 27, 1997 available at <http://www.detroitnews.com> (last visited April 28, 2002) (reporting that "[t]he slave trade produced a slew of cottage industries from textiles to insurance companies that some historians say made even poor whites rich. 'The textile industry [and] the insurance industry was built off the back of the slave,'" said Claud Anderson, author of *BLACK LABOR: THE SEARCH FOR POWER AND ECONOMIC JUSTICE*.").

221. *See Brief History of Lloyd's*, available at <http://www.lloydsfondon.com> (last visited Oct. 15, 2000), for a discussion on how the Lloyd's Act 1871, which provided the business with a sound legal basis and laid the foundations for today's market, incorporated the Society of Lloyd's.

at the peak of the African slave trade. "Lloyd's of London . . . is still . . . the largest meeting place for underwriters and shippers to transact marine insurance business. In 1906, the British Parliament enacted the Marine Insurance Act [which] continues to influence marine insurance policy wordings and conditions."<sup>222</sup>

In America, the "slave trade also built entire industries, from rum distilleries to insurance companies"<sup>223</sup> in the Northeast. In Connecticut, for example, the "now-defunct Hartford Life Insurance Company . . . sold slave policies. And [among American insurers,] Boston insurance companies . . . made up the majority of the underwriters for Rhode Island slave voyages [.]"<sup>224</sup>

What did British and American insurers insure against? Simply put, the insurers sold "all risks" marine insurance to the slave traders. Under the typical contract, insurers agreed to indemnify slave traders if specific perils<sup>225</sup> caused traders to lose slave ships, cargo (slaves), voyages, or crews. In addition, if an exclusion clause did not appear in the contract, underwriters also agreed to indemnify slavers when "all other Perils, Losses and Misfortunes . . . shall come to the Hurt, Detriment or Damage of the said Goods and Merchandizes and Ship [.]"<sup>226</sup>

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Lloyd's began in Edward Lloyd's Thames-side coffee house in Tower Street in the City of London. Although the exact date of its establishment is unknown, evidence exists that Lloyd's coffee house was well known in London business circles by 1688. Lloyd himself was not involved in insurance but provided premises, reliable shipping news and a variety of services to enable his clientele of ships' captains, merchants and rich men to carry on their business of insuring ships and their cargoes. The wealthy individuals in the coffee house would each take a share of a risk, signing their names one beneath the other on the policy together, with the amount they agreed to cover. For this reason they were known as 'underwriters.' *Id.*

222. See also History of Auto Insurance, *supra* note 206 (noting that, "In 1769, underwriters took their informal arrangement and [formally] founded Lloyd's of London. [In] 1734, the official list of vessels and values known as the 'Lloyd's List' was published. [It is still] the leading shipping list in the maritime insurance industry.").

223. See Tatsha Robertson and Ross Kerber, *Slave Trade Gets a Fresh Look—New Englanders Surprised by Their Ties to the Painful Practice*, STAR. TRIB. MINNEAPOLIS-ST. PAUL, Aug. 8, 2000, at 9E.

224. *Id.*

225. See ELIZABETH DONNAN, II DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF THE SLAVE TRADE TO AMERICA 623-24 (Octagon Books, Inc. 1932), to review a 1794 slave trade marine insurance contract. That year, Lloyd's of London sold a policy to cover a slave ship and her voyage "from Liverpool to the Coast of Africa, during her stay of trade there and at and from thence to her port or ports of discharge[.]" The policy covered specific risks "of the Seas, Men of War, Fire, Enemies, Pirates, Rovers, Thieves, Jettizons, Letters of Mart and Counter Mart, Surprizals, Takings at Sea, Arrest, restraints and Detainments of all Kings, Princes and People, of what Nation, Condition or Quality soever: Barretry of the Master and Mariners." *Id.*

226. *Id.* at 624.

Did the standard "all risks" marine insurance contract include "commercial terrorism" as a risk insured against? The answer is no, although much later commercial property and terrorism insurance evolved from marine insurance. Slave traders were extremely concerned about terror, which manifested itself in the form of slave insurrections on both ships<sup>227</sup> and land.<sup>228</sup> Consequently, slavers purchased or tried to purchase coverage for insurrections.<sup>229</sup> Arguably, this was a very inefficient use of capital; slavers should have expected intermittent episodes of "terrorism" as part of the cost of doing business. Besides slave revolts seldom produced substantial casualties or financial losses.<sup>230</sup>

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227. E.g., Bernard Bailyn, *Considering the Slave Trade: History and Memory*, 58 THE WILLIAM AND MARY QUARTERLY, 1 (2001) at <http://www.historycooperative.org/journals/wm/58.1/bailyn.html> (last visited on Jan. 16, 2004).

[S]lave rebellions occurred on approximately 10 percent of all slave ships, [ten] percent of the slaves on such voyages were killed in the insurrections (which totals 100,000 deaths, 1500–1867), and the fear of insurrection increased shipboard staffing and other expenses on the Middle Passage by 18 percent. [T]he incidence of revolts did not increase with the decline in crew size, hence that slave-centered factors determined the uprisings. [Also] shore-based attacks on European slave ships were twenty times more likely in the Senegal and Gambia River areas than elsewhere in Atlantic Africa. *Id.*

228. See, e.g., Kendall Clark, *Patrols and Privilege*, at <http://monkeyfist.com/articles/813> (last visited April, 29, 2002) (reviewing SALLY E. HADDEN'S, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* (Harvard University Press, 2001)).

In the colonial period, white settlers feared both widespread slave insurrection, perhaps the first mass, apocalyptic terror of American culture, and invasion or attack by competing colonial powers. The militia system could not respond to both threats simultaneously. Slave patrols were developed as a kind of supplementary force. *African slaves were thus the first in a series of social groups suspected of 'fifth columnist' activity — the first moment in a long American tradition of paranoia and demonization, one that's active today in the detainment of hundreds if not thousands of persons, held without trial, since the September 11th attacks.* Of course white settlers had reasons to fear insurrection, reasons which were embedded in a context of systematic injustice. Slaves were justified in trying to overturn oppression, despite white claims about Africans being a race of natural slaves. [T]hree insurrections demonstrated the resolve and determination of slaves: the Stono Rebellion [of] 1739 and the insurrections of Denmark Vesey [in] 1822 and Nat Turner [in] 1831. (emphasis added) *Id.*

229. See JAY COUGHTRY, *THE NOTORIOUS TRIANGLE* 99, n.104 (1981) (illustrating that "[u]nderwriters generally included an insurrection clause in the standard rate, but an equally common loophole greatly reduced its usefulness. The standard terminology was 'warranted free from average by insurrection under 5 percent.'"), and RAWLEY, *supra* note 217, at 260 (writing that "[p]olicies ordinarily excepted losses by insurrections under 10 per cent of the whole value. A Bristol voyage in 1748 insured at 8 per cent; another in 1762 at 12; and a third in 1792 at only 3.5 per cent. The slave trade, it is plain was a business fraught with more than normal risks, [like] slave mortality and insurrection.").

230. *Id.* ("Knowing from long experience that shipboard slave revolts seldom resulted in extensive slave losses, insurance companies limited their liability to losses of at least 5 and sometimes 10 percent of the total number of slaves on board.").

More significant, it was slavers, themselves, who created the very conditions, which caused slaves to revolt and terrorize their captors.<sup>231</sup> Again, the transatlantic slave trade was essentially three-hundred-plus years of commercial terrorism, which British and American merchants practiced with vigor and with substantial assistance from insurance companies and investors. Yet, slave traders insured themselves and their property against the very horrors that they practiced so ruthlessly, systematically and diligently against innocent men, women and children. Furthermore, as discussed more thoroughly in Part IV, British and American marine insurers readily insured slaver traders from all types of risks, including the terror accompanying slave insurrections.<sup>232</sup>

### B. *The Regulation of British Insurers During the Transatlantic Slave Trade*

The earliest marine insurance contract in England dates from 1555.<sup>233</sup> Seven years later — in 1562 — the transatlantic slave trade began, terminating officially nearly three hundred and twenty years later in the late nineteenth century.<sup>234</sup> Undeniably, during this entire period, British under-

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231. *Id.* ("Slaves [were] unwilling and, at times, uncooperative passengers; elaborate security measures were necessary in order to keep them from sabotaging the ship or eliminating their captors altogether. Escape and revolt attempts plagued unwary captains[.]").

232. It is important to state at this point out that — although British and American insurers were the major players in the slave trade — other European insurers also sold insurance policies to the slave traders, for example, see FRANK C. SPOONER, *RISKS AT SEA — AMSTERDAM INSURANCE AND MARITIME EUROPE, 1788-1780*, 151 n. 128 (Cambridge Univ. Press 1983) ("In March 1776, a relevant case of revolt on board [a ship] was decided by the Admiralty court, Marseilles: [T]he slaves were considered to be merchandise; the insurance policy included navigation to the Guinea coast and so it was construed that the cargo should consist of slaves; and the revolt took place as sea, so the underwriters were liable.").

233. See THE AUSTRALIAN LAW REFORM COMMISSION, *THE HISTORY OF MARINE INSURANCE LAW*, n. 11 and accompanying text at <http://www.austlii.edu.au/au/other/alrc/publications/reports/91/ch5.html> (last visited May 6, 2002); ALEX L. PARKS, *THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE* 6 (Cornell Maritime Press, 1987).

234. Even after the English Parliament "formally abolished and enacted the Abolition of the Slave Trade Acts in 1807 and in 1833, the "illegal" trafficking in slaves continued into the very late nineteenth century. Therefore, Parliament enacted additional statutes to address the so-called "illegal slave trade." See THE SLAVE TRADE (EAST AFRICAN COURTS) ACT OF 1873, 36 & 37 VICT. c. 59, § 3 (stating that, "All jurisdiction is hereby conferred on the East African courts, in regard to vessels seized by the commander or officer of any of Her Majesty's ships on suspicion of being engaged in or fitted out for the slave trade."); The Slave Trade Act, 1873, 36 & 37 Vict. c. 88, § 3 (a).

Where a vessel is, on reasonable grounds, suspected of being engaged in or fitted out for the slave trade, it shall be lawful for any commander or officer of any of Her Majesty's ships to visit and seize and detain such vessel, and to seize and detain any person found detained or reasonably suspected of having been detained as a slave, for the purpose of the

writers — along with an impressive group of world-renowned and celebrated investors,<sup>235</sup> national heroes,<sup>236</sup> philosophers,<sup>237</sup> politicians,<sup>238</sup> merchants<sup>239</sup> and religious bankers<sup>240</sup> — aided and abetted the chief participants in the slave trade. However, underwriters arguably played the

slave trade.”); The Slave Trade (East African Courts) Act of 1879, 42 & 43 Vict. c. 38, § 4 (“Each of the East African courts shall have the same jurisdiction in regard to a British vessel seized on suspicion of being engaged in or fitted out for the slave trade, and to the persons, slaves, goods, and effects on board. *Id.*”).

235. See Tammariello, *supra* note 147.

The British South Sea Company founded in the early 1700s as an officially sanctioned monopoly to furnish African slaves to Spanish American empire claimed some notable shareholders. Among those holding slave stocks were Sir Isaac Newton, formulator of the law of gravity; Jonathan Swift, the great Irish-born satirist; the [E]arl of Halifax, founder of the bank of England; Daniel Defoe, author of ‘*Robinson Crusoe*’ not to mention numerous ‘royals.’ *Id.*

236. Individuals like the following two would fall into this category: Sir John Hawkins and Sir Francis Drake. See e.g., Andrew Malone and David Munk, “*Admiralty Blocks Drake’s Return From Deep*,” 1995 Westlaw 7641373, TIMES LONDON (Jan. 15, 1995) (stating that the “[P]lan to raise the body of Sir Francis Drake for burial alongside other heroes at Westminster Abbey are being scuppered. [His] work as a slave-trader and plunderer is an embarrassment despite the fact that he robbed for England and the Queen [Elizabeth I]”); John Young, *Shipbuilder Who Launched the British Empire*, 1999 Westlaw 8014846, TIMES LONDON, at 16, (Aug. 9, 1999) (noting, “Sir John Hawkins made his fortune in the slave trade.”).

237. E.g., Melvyn Bragg, “*Slavery Is No Simple Black and White Issue*,” 1998 Westlaw 4809304, TIMES LONDON, at 18, (Jan. 12, 1998) (reporting, “It is important to give the past its due. [Sir John] Locke, the philosopher of Liberty; [and] [Sir John] Newton, the discoverer of new worlds invested in the slave trade.”).

238. E.g., *A Bristol Hero*, *supra* note 219, at A30 (stating, “[T]his southwestern port city is only just beginning to come to terms with the way Edward Colston made his money — the slave trade. The 18th-century merchant and member of Parliament now polarizes residents of Bristol, which for more than a century was one of Britain’s main slave-trading ports.”).

239. Tammariello, *supra* note 147.

All slave captains were, essentially, murderers. As the traveler William Baikoe put it after a journey to Africa in the 1850s: ‘There is no captain who has carried slaves who has not been, directly or indirectly, guilty of murder (for) a certain number of deaths are always allowed for’. The same holds true of the European-based merchants who financed and organized the traffic.’ *Id.*

240. *How Quakers Earned Oats*, THE GUARDIAN REV., (Aug. 2, 1999), available at 1999 WL 22083414.

The involvement of Barclays bank in the slave trade (Pass Notes, July 28; Letters, July 30) should be understood in the context of the times. In the mid-18th century, trading in slaves was the norm. . . . Barclays bank was not founded until 1896, when 12 private banks amalgamated to form a limited company. Barclay, Bevan and Company of Lombard Street was one of the lead banks in this new bank. It provided roughly one third of the capital. . . . In 1756, the partners in Barclay, Bevan and Company were Joseph Freame and James Barclay. James Barclay was Joseph Freame’s brother-in-law. The Barclay share of the profit of £26,165-1-11 was £8,721-13-11. *Id.*

major supporting role, which ensured the success and longevity of that terrorizing enterprise. As mentioned earlier, two reasons help to explain insurers' predominate role: 1) transatlantic slave traders would not commence such a risky enterprise without insurance; and, 2) investors would not invest in slave ventures and voyages if the slavers did not purchase insurance. There is an additional explanation; the business of insurance in England was essentially unregulated.

During the three-hundred-plus years of the slave trade, underwriters and the business of insurance were either totally unregulated or poorly regulated in England. First, insurers were completely unregulated during the Elizabethan era, 1562-1601.<sup>241</sup> Quite simply, anyone could insure all types of ventures and voyages — both legal and illegal — without worrying about violating some Elizabethan public policy. In fact, the overwhelming majority of underwriters were individual merchants<sup>242</sup> who practiced the craft on a part-time basis.<sup>243</sup> Although a few partnerships

241. Here, the Elizabethan era is the period between 1562 — when Queen Elizabeth I awarded the first slave-trade patent to John Hawkins, and 1601 — two years before her death in 1603. See *Mahoney v. Ashton*, 4 H. & McH. 295, 1799 Westlaw 397, \*13 (Md. Gen. 1799). 'The English did not engage in this trade until 1562. . . . Queen Elizabeth [granted a patent] to an African company in the year 1585. In 1592 another patent was granted, under which this trade to the coast of Africa was prosecuted. . . .' *Id.*; ERIC WILLIAMS, *CAPITALISM AND SLAVERY* 30 (Chapel Hill: Univ. of North Carolina Press, 1944, reissued Russell and Russell, 1961) (noting, "Like so many Elizabethan ventures, [John Hawkins's first slave-trading expedition] was a buccaneering — [a pirating]— expedition," designed to steal slaves from the Portuguese. Furthermore, after Hawkins stole the slaves from the Portuguese, he "sold [them] to the Spaniards in the West Indies.").

242. Who were and what was the ethnicity of these merchant-insurers? See GEORGE CLAYTON, *BRITISH INSURANCE*, 28 (London: Elek, 1971).

Suffice to say that Spain deserves special mention. . . because Barcelona was the first city to attempt to regulate the practice of marine insurance by ordinance. . . . Insurance, it seems, came to England later than to either Spain or Belgium. . . . It is not until the 16th century that we find records of insurances. . . . That is not to say that no insurance was conducted in England before the 16th century. It was, but by Lombard rather than English merchants. The Lombards had come to England and established strong commercial roots [and] forced to share common ground with the Jews for many years [until the latter were forced] from England by Edward I in 1290. [T]he Lombards were left in sole possession of the field of finance. . . [until] as late as the mid-16th century. Thereafter, English merchants began to assert their position, yet they still had to fight the privileges enjoyed by the Flemish and Hanse merchants. . . . It was not until. . . 1578, that the English merchant could call his home his own. *Id.*

243. RALPH STRAUS, *LLOYD'S: THE GENTLEMEN AT THE COFFEE-HOUSE*, 19 (N.Y.: Carrick & Evans, Inc. 1938) ("[M]arine insurance of one kind or another [was] a regular side-line to ordinary business. Merchants had their agents for the buying and selling of goods, and these agents, or brokers, would arrange for such insurance as was required.").



sold marine insurance,<sup>244</sup> corporate insurers were absent.<sup>245</sup> More important, sophisticated insurance contracts were rare. Instead, merchant-underwriters and those wanting insurance gathered informally<sup>246</sup> and consummated simple written agreements,<sup>247</sup> involving slave ventures<sup>248</sup> and other maritime activities.

Without doubt, the underwriters embraced some moral principals and conventions<sup>249</sup> to govern their business and interpersonal relations. But Parliament's complete failure to regulate the business of insurance between 1562-1601 exposed insurance consumers — including unsuspecting and immoral slave traders — to deceptive business practices and to certain moral hazards. For example, misrepresentation, fraud and over in-

244. NIEKERK, *supra* note 214, at 625 ("Although part-time insurers underwrote policies as individuals, and generally not as partners in a firm. . . there is evidence of private partnerships of underwriters. . .").

245. Corporate insurance did not arrive in Britain until the mid-eighteen century. STRAUS, *supra* note 243, at 31 ("[M]arine insurance in the 16th century is notably characterised by a complete absence of corporate character."); BARRY SUPPLE, *THE ROYAL EXCHANGE ASSURANCE: A HISTORY OF BRITISH INSURANCE, 1720-1970*, 4-5 (Cambridge, England, 1970) ("[T]he Royal Exchange Assurance, the pioneer marine insurance company, was established by a Royal Charter of 22 June 1720 [along] with its sister Corporation, the London Assurance. . . . [The REA's] creation marks an important stage not only in the development of insurance [and] the business corporation in Britain.").

246. STRAUS, *supra* note 243, at 18.

[T]he almost complete lack of early English legislation in the matter of insurance was due largely to its foreign origin and growth. . . . There were no private "offices" or public exchanges where only insurance business was transacted and no group of citizens influential enough to persuade Parliament to pass important legislation of the kind. The only step towards collective security before [and during] Elizabethan times seems to have been the informal gatherings of shipowners and merchant [-insurers. *Id.*

247. *Id.* at 18-9.

In an early Insurance policy preserved amongst the Admiralty Court Paper's at the Record Office, and dated 1547, it [reads]: 'As for the aventure that the assurers shall stande at, it is to be understoode that this presented writinge hath as muche forse as the beste made or dicted byll of surance which is used to be made in Lombarde Streete of London.' The policies seem to have been simple, and of late years an increasingly large number of them had been drawn up and attested by the Notaries of the city. . . . *Id.*

248. See, e.g., COUGHTRY, *supra* note 229, at 95 (stating that, "[M]arine insurance [p]olicies on slaving vessels written in London during the 1760s were very similar to those issued in Bristol, Rhode Island, at the turn of the century. London firms, which obviously could not personally inspect the vessels and cargoes they were underwriting, simply required a detailed description of vessel and cargo prior to effecting a policy.").

249. See, e.g., CLAYTON, *supra* note 242, at 30.

[After reviewing a few Elizabethan insurance policies], one is immediately struck by the pre-eminence and customary force of Lombard Street. . . . [Also, there is] pointed reference to the custom, tradition and binding force of insurance underwriting [on] that street. . . . Because this sense if custom [existed] so strongly, it follows that policies were really short. Conventions had been established and merchants and underwriters were morally bound by those conventions [, which explains] the brevity of the policy. *Id.*

insurance were rampant.<sup>250</sup> Also, many merchant underwriters often refused to pay insurance proceeds after a proof of a loss, because they failed to maintain sufficient pools of capital to cover all claims.<sup>251</sup> A significant number of underwriters deviated from sound, customary practices and speculated or gambled<sup>252</sup> on a variety of immoral activities,<sup>253</sup> including trafficking in slaves.

Recognizing that insurance fraud and other malpractices had become so prevalent, an enterprising merchant petitioned the Privy Council<sup>254</sup> for a patent to establish and operate a monopoly that would compel under-

250. See STRAUS, *supra* note 243, at 20 (stating that, "[T]here was a certain amount of misrepresentation and fraud and, while underwriting remained unorganized, [there was] no infallible method of putting a stop to it."); CLAYTON, *supra* note 242, at 31-32. "[C]ertain malpractices were prevalent to the obvious detriment of the insurance market generally. Notable amongst these was the practice of double or over insurance, so that in the event of a loss or damage profit would accrue." *Id.*

251. See, e.g., CLAYTON, *supra* note 242, at 31. [Elizabethan] underwriters. . . were carrying on their business with insufficient capital. The business called for organization on a larger scale, for adequate information and for greater technical precision in the estimation of risks and the fixing of premiums, so that insurer and insured might both be more fully protected. Many of these requirements were completely lacking in the 16th century. . . . *Id.*

252. See NIEKERK, *supra* note 214, at 625.

Being part-time insurers of risk, most [merchant-underwriters] were no doubt attracted by the speculative possibilities offered by this business. Numerous merchants speculated on making a profit by pocketing a part of the insurance premium paid [to cover] a certain ship or her cargo. On occasion the premium rates were highly lucrative, and rates. . . between 20 and 40 per cent. . . were not uncommon. . . . For most of [the] part-time participants there was little difference between insurance underwriting and gambling. *Id.*

253. See, e.g., WILLIAM WITT BLACKSTOCK, *THE HISTORICAL LITERATURE OF SEA AND FIRE INSURANCE IN GREAT BRITAIN, 1547-1810: A CONSPECTUS AND BIBLIOGRAPHY*, 23 (Manchester, Eng., 1910) (A certain George Stoddard — Elizabethan grocer as well as a part-time underwriter, lender and gambler — wrote in his dairy that a certain individual owed Stoddard money "for a wager layde wth hee upon a boye or girle, the wych I have won.").

254. Most law students learn about the Judicial Committee of the Privy Council's judicial function during their first year while grappling with that illusive concept — proximate cause. See *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co., Ltd.*, A.C. 388, 423 (P.C. 1961) ("Wagon Mound No. 1"). "It is a principle of civil liability. . . that a man must be responsible for the probable consequences of his act." *Id.* But the Privy Council also has an advisory function. See, e.g., *Ledsam v. Russell*, 9 Eng. Rep. 931 (1848).

The assignees of letters patent may lawfully obtain a renewal of such patents. The statute does not authorise the Judicial Committee of the Privy Council to impose terms as conditions on which patents are to be renewed. The authority of the committee is limited to reporting on matters. . . . In the year 1838, a petition was presented to the Queen, praying for the extension of the term of the patent. This petition was referred to the Judicial Committee of the Privy Council, [afterward] the lords of the committee expressed an opinion favourable to the application [.] *Id.*

writers to register all insurance instruments, for a handsome fee.<sup>255</sup> Fiercely independent and free-market underwriters opposed the patent.<sup>256</sup> The petitioner, however, prevailed and the Office of Policies and Assurances opened in 1575.<sup>257</sup> It operated for more than a century<sup>258</sup> and instituted some practices, which American insurance commissioners still embrace today.<sup>259</sup>

But the Office of Assurances could not prevent or reduce insurance fraud and other malpractices. Therefore, in 1601, Sir Francis Bacon<sup>260</sup> went before the House of Commons and sponsored a bill, which would become England's first legislative effort to regulate the business of insurance. In light of Bacon's political savvy<sup>261</sup> and his art of persuasion,<sup>262</sup>

255. See NIEKERK, *supra* note 214, at 225 and n. 133 (stating that, "In 1574, Richard Candler applied to the Privy Council for a patent to establish an Office of Assurances. . .").

256. See, e.g., *Veale v. Priour Hardres*, 145 Eng. Rep. 492, 494 (1664) (finding for plaintiff in an action on the case that [defendant disturbed] plaintiff in exercising the Office of the Registership of Policies of Assurance); STRAUS, *supra* note 243, at 20-21 ("[T]here was opposition from the notaries public. [They asked:] Would not the proposed patent be an uncalled-for interference with [their] liberty [And they asserted that the] proposed Office of Assurances [would force them] into a line of action which might do [them] considerable harm.").

257. The exact official name of the office is not clear, as several different titles appear in historical documents. See, e.g., *Id.* (referring to the establishment as "the Office of the Registership of Policies of Assurance [which] by the statute is only an office for registering policies of assurance."); CLAYTON, *supra* note 242, at 31 (referring to the establishment as the "*Office or Chamber of Assurances in 1576*" (emphasis added)); STRAUS, *supra* note 243, at 21 (referring to it as the "Office of Assurances").

258. See NIEKERK, *supra* note 214, at 225 and n. 137. "The Office functioned for over a century, with the patent being renewed periodically." *Id.*

259. See CLAYTON, *supra* note 242, at 32 (Along with establishing mandatory registrations with the Office, "commissioners were appointed to settle fees and disputes" and standardized or boilerplate insurance policies evolved.").

260. It is worth noting that Sir Francis Bacon was born to Queen Elizabeth I — who never married — on January 25, 1561, just one year before the Queen gave Sir John Hawkins a patent to start the transatlantic slave trade and the terror that followed. See PETER DAWKINS, *DEDICATION TO THE LIGHT* (Warwick, England: Francis Bacon Research Trust, 1984) (Part II of the book outlines the life and times of Francis Bacon, 1561-1572; and that part also discusses the love affair between Queen Elizabeth I and the Earl of Leicester as well as the royal birth and adoption of Francis Bacon). See also Peter Dawkins, *Sir Francis Bacon as a Child*, <http://www.sirbacon.org/links/childbacon.html> (last visited May 9, 2002) (reporting that Francis Bacon's true parents were Queen Elizabeth I and the Earl of Leicester and reporting that the Queen required "complete secrecy [regarding] her motherhood if she were to maintain her public image as the Virgin Queen.").

261. Cf. FREDERICK E. BIRKENHEAD, *FOURTEEN ENGLISH JUDGES 6-7* (London: Cassell & Company, 1926) (stating that, "His professional career continued to flourish, and he became at last Attorney General. His appointment proved that he had not lost the regard of his fellow members, for though the Commons resolved that no Attorney General should sit in their House, a special exception was made in Bacon's favour.").

the House enacted the Assurance Act of 1601.<sup>263</sup> Briefly put, the legislation created a deliberative body<sup>264</sup> which became known by various names: the Court of Policies and Assurances,<sup>265</sup> the Court of Assurance,<sup>266</sup> the Chamber of Assurance,<sup>267</sup> and the Court of Commissioners of Policies of Insurance.<sup>268</sup>

Actually, the Court of Assurance was a quasi-judicial body, functioning more like an arbitration commission than a court of law.<sup>269</sup> It had authority to regulate the business of insurance, to curtail malpractices among insurers and to hear and settle insurance disputes informally, without being concerned about protecting merchant-underwriters' procedural due process rights. More astounding, the court also could examine witnesses under oath and send deviant underwriters to prison "without baile or mainprise."<sup>270</sup> Yet, the Court of Assurance was not a success. In truth, between the court's inception in 1601 and its demise in 1720, it had heard less than a case per year.<sup>271</sup>

262. See BLACKSTOCK, *supra* note 253, at 26-27 (presenting an extract of the speech that Bacon delivered in the House of Common on December 7, 1601 in support of the Assurance Bill.).

263. Assurance Act of 1601, 43 Eliz. c. 12 (1601).

264. See *Lucena v. Craufurd*, Eng. Rep. 630, 643-644 (1826).

The 43 Eliz c. 12, which erected 'a court for [hearing] and determining causes arising on policies of insurance,' has indeed adverted only 'to the usage of the merchants both of this realm and of foreign nations, when they make any great adventure, to give some consideration of money to other persons to have from them assurance made of their goods, merchandizes, ships, and things adventured, which course of dealing is commonly called a policy of assurance.' *Id.*

To see the old English (Elizabethan) or the original version of the quoted passages, see Straus, *supra* note 243, at 22; Clayton, *supra* note 242, at 32.

265. See *Denoir v. Oyle*, 82 Eng. Rep. 621 (1649) (commenting that, "[T]his case [concerns a motion to show] cause why a prohibition should not be granted to the Court of Policy for Assurances.").

266. See STRAUS, *supra* note 243, at 20 (referring to the quasi-judicial body as "the Court of Assurances").

267. See CLAYTON, *supra* note 242, at 32 (stating that "[T]he establishment of the Chamber of Assurances [reduced] the burden place upon the Admiralty Court.").

268. See *Delbye v. Proudfoot*, 89 Eng. Rep. 662 (1692) ("The Court of Commissioners of Policies of Insurance only extends to suits by the insured against the underwriters [.]").

269. See STRAUS, *supra* note 243, at 22 (stating, "As for the Court itself, there [was] a Standing Commission, 'to be renewed yerelie as the least, and otherwise soe often' as the Lord Chancellor or Lord Keeper of the Great Seal should determine."); CLAYTON, *supra* note 242, at 32 ("The court consisted of fourteen commissioners, six of them professional lawyers [.] 'the judge of the Admiraltie for the time beinge, the Recorder of London for the time beigne, two Doctor of Civial Lawe, and two common Lawyers,' and eight other commissioners who should be 'grave and discrete merchants.'").

270. See *Id.*

271. See WILLIAM GOW, *MARINE INSURANCE: A HANDBOOK* 7 (2d ed. Macmillan & Co, Ltd. 1900) (reporting fewer than sixty cases).

Consequently, fraud, misrepresentations, gambling, and other malpractices and moral hazards continued. In fact, speculative practices (bubbles) and speculation disguised as insurance increased substantially in tandem with the transatlantic slave trade. Why were the insurance commissioners so ineffective? There are several competing explanations: the merchant-underwriters did not respect the court's authority to regulate insurance affairs;<sup>272</sup> the commissioners could regulate and resolve matters only associated with the contracts registered in the Office of Assurance; and commissioners performed perfunctorily, as they were not paid.<sup>273</sup>

But a more serious problem undermined the commissioners' ability to regulate the business of insurance: the Assurance Court did and could not exercise original and exclusive subject-matter jurisdiction over all insurance matters, including "unregulated" private contracts and the "regulated contracts" which were registered in the Office of Assurance.<sup>274</sup> More significant, England's common law courts even attacked the Court of Assurances' concurrent jurisdiction over matters pertaining to insurance.<sup>275</sup> The sum effect of those attacks and other problems produced

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272. See CLAYTON, *supra* note 242, at 32 (stating, "Unfortunately, the new court found no favour with the mercantile community for whose benefit it was established.").

273. See generally NIEKERK, *supra* note 214, at 227 and nn. 142-143 (outlining the major organizational problems undermining the Court of Assurance); STRAUS, *supra* note 243, at 22-23 (noting that, "During the ninety years of existence the Court of Assurance was never a great success. Its only real importance lies in the fact that by taking no cognizance of policies not registered at the Office of Assurances, it helped to maintain Candler's patent.").

274. See STRAUS, *supra* note 243, at 22 ("[The Court of Assurances'] jurisdiction was confined to London [:] it was frequently at odds with the regular courts of law, and [there were frequent appeals of] its decisions to the High Court of Chancery.").

275. Typically, a disgruntled party who did not want the Court of Assurance to decide or hear an insurance-related matter petitioned a superior court for a *writ of prohibition*. Simply put, the writ ordered the Court of Assurance to stop deciding the controversy or refrain from intervening in a matter because another court had "superior" jurisdiction. To be sure, the *writ of prohibition* severely reduced the Court of Assurance's ability to reduce insurance malpractices, fraud and other immoral practices, like trafficking in slaves. See *Denoir v. Oyle*, 82 Eng. Rep. 621, 622 (1649) (granting a *writ of prohibition* because the subject matter concerned life insurance and not merchandizing over which the Court of Assurance has proper jurisdiction); *Came and Moyer's Case*, 82 Eng. Rep. 1290 (1658) (concluding that plaintiff could sue the defendant again in a common law court, even though the plaintiff had lost his case before the Court of Assurance); *Delbye v. Proudfoot*, 89 Eng. Rep. 662, 663 (1692) (granting a *writ of prohibition* because the Court of Assurance has "no jurisdiction in this case of fraud," concluding that giving the Assurances Court such jurisdiction "would erect another Court of Equity in consequence to control suits at law," and suggesting "that any other construction of [43 Eliz. c. 12 (1601)] would make a clashing of jurisdictions."). See also, *Johnson v. Desmoneere*, 23 Eng. Rep. 429 (1683) (reversing the decree of "the Court of Policies and Assurances in London [because] the parties agreed to the matter in [as] an *action on the case* [in a court of law]").

only a superficial regulation of insurance; and this was the state of insurance regulation in Britain, arguably during the height, the most ruthless and the most terrifying period of the transatlantic slave trade, 1601-1720.

To be sure, England enacted other legislation between 1720 and 1879 to regulate underwriters and to stop their abuses. For example, the House of Commons enacted the Bubble Act of 1720<sup>276</sup>, in part, to restrain extravagant and unwarranted insurance practices. But it only regulated corporate insurers' conduct; under the act, individual insurers still could continue their highly questionable and speculative insurance activities.<sup>277</sup> Twenty-six years later, the House enacted the Marine Insurance Act of 1746,<sup>278</sup> which placed only minimum prohibitions on wagering policies<sup>279</sup> and treaties of reinsurance.<sup>280</sup>

For the next thirty years, Parliament did not pass any legislation to regulate British insurers. Then it enacted the Marine Insurance Act of 1774, which required the owner of a life insurance policy to have an insurable interest in the continued existence of the insured's life.<sup>281</sup> Fourteen years later, the English government enacted the Marine Insurance Act of

276. Bubble Act of 1720, 6 Geo. I, c. 18 (1720).

277. See SUPPLE, *supra* note 245, at 32 (stating, "[The measure was described as 'An Act for better securing powers and privileges, intended to be granted by His Majesty by two Charters [to the Royal Exchange Assurance and the London Assurance] for assurance of ships and merchandizes at sea, and for lending money upon bottomry; and for restraining several extravagant and unwarrantable practices therein mentioned.']"). See generally CLAYTON, *supra* note 242, at 53-54.

278. 28 Geo. 2, c. 37 (1745).

279. See Johnny C. Parker, *Does Lack of an Insurable Interest Preclude an Insurance Agent From Taking an Absolute Assignment of His Client's Life Policy?*, 31 U. RICH. L. REV. 71, 71 n.1 (1997).

The origins of the insurable interest doctrine can be traced to [19 Geo. 2, ch. 37, 511 (1746)] which declared in relevant part: [N]o assurance or assurances shall be made by any person or persons, bodies corporate or politic, on any ship, or on any goods, merchandise, or effects without further proof of interest than the policy, or by way of gaming or wagering, and, that every such assurance shall be null and void to all intent and purposes. *Id.*

280. See EDWIN W. KOPF, NOTES ON ORIGIN AND DEVELOPMENT OF REINSURANCE 27, at <http://www.casact.org/pubs/proceed/proceed29/29421.pdf> (visited May 11, 2002). Some under-writers found they could affect reinsurance with others. Underwriters were accustomed to assign parts of risks to others at lower rates, and these reinsures had hopes of finding other persons who would take parts of these risks at still lower rates. This traffic in premium differences was so greatly abused that in 1746 it was forbidden [(19 Geo. 2, c. 37, Section 4 1746)]. Under this statute, reinsurance was permitted only if the party whose risk was re-insured was insolvent, bankrupt or in debt and if the transaction was expressed in the policy to be a reinsurance. The statute was more or less of a dead letter and was repealed by 27 and 28 Vict.c 56, Section I on July 25, 1864. *Id.*

281. 14 Geo. 3, c. 48, 398 (1774). See also Parker, *supra* note 279, at 71 n.1 (noting, "The Marine Act of 1774 is another anti-wagering statute 'for regulating insurance upon lives, and for prohibiting all such insurances, except in cases where the person insuring shall have an interest in the life or death of the person insured.'").

1788.<sup>282</sup> The scope of that legislation was also very restrictive: “it required the name of the assured to be inserted in all policies”;<sup>283</sup> but it did little to control underwriters’ deceptive practices and immoral conduct, like underwriting the transatlantic slave trade.

In effect, the British government did not enact any significant legislation to arrest merchant-underwriters’ and corporate insurers’ immoral practices until 1807.<sup>284</sup> That year, the government passed the first act to abolish the transatlantic slave trade. A key provision in the Slave Trade Act of 1807<sup>285</sup> prohibited all insurers from underwriting and from aiding and abetting the slave trade. In addition, the statute gave the government and private persons broad powers to stop insurers’ participation in the horrors of the slave trade; and it imposed stiff fines on guilty insurers. But again, when Parliament finally decided to get serious about persons’ trafficking in and terrorizing slaves — with substantial assistance from insurers — the slave trade was two hundred and forty years old.

### C. *The Regulation of American Insurers During the Transatlantic Slave Trade*

At the outset, we should note: 1) marine insurance was the predominant form of underwriting in America during the transatlantic slave trade, before and after the American Revolution;<sup>286</sup> and, 2) both settlers and British subjects engaged in the business of insurance in colonial America. Among the settlers, a few wealthy merchant-shipowners used a “fractional interests” system to insure their ships and cargoes.<sup>287</sup> They divided

282. 28 Geo 3, c. 56 (1788).

283. See Sarah Derrington, *Does the Marine Insurance Act 1909 (Commonwealth) Still Serve the Needs of the Business Community?* 7 AUSTRALIA INS. L. J. 31 (1995), 1995 ILJ Lexis 10, \*5.

284. Actually, after Parliament passed the last marine insurance statute in 1788, it did not enact another statute for the next one hundred and eighteen years. It passed the Marine Insurance Act 1906 — [6 Edw. 7, c 41 (1906)]. In the process, it repealed all the former marine insurance statutes and practically rewrote the whole body of marine insurance law.

285. 47 Geo. 3, sess. 1, ch. 36 (1807).

286. The American Revolution is also called the American War of Independence — the period between 1775 and 1783. The Thirteen Colonies on the Atlantic seaboard of North America fought for and won independence from Great Britain and became the United States.

287. See EDWIN J. PERKINS, *THE ECONOMY OF COLONIAL AMERICA* 88 (1980). [In colonial America,] the leading merchants were engaged extensively in foreign commerce. Most mercantile fortunes were the result of profits in overseas ventures. An important merchant probably owned a few ships outright and almost certainly took fractional interests in other ships and their cargoes. Spreading risks through the device of fractional interests was an early substitute for marine insurance. If one ship went down at sea, the loss would not fall completely on the shoulders of a single merchant. *Id.*

the ownership of the vessels among themselves to transfer and distribute risks. Therefore, when various perils destroyed their ships and/or cargoes, each merchant bore just a part of the loss.<sup>288</sup>

Also, before and after the War of Independence, a significant number of American settlers sold marine insurance on a part time basis. To illustrate, "[b]efore the Revolutionary War, individual underwriters [in Pennsylvania] issued policies on hulls and cargoes."<sup>289</sup> New York merchant-underwriters underwrote shippers' business activities in that colony and elsewhere, especially in Rhode Island.<sup>290</sup> South Carolina was the most commercially active southern colony,<sup>291</sup> some of its merchants sold and attempted to build a thriving insurance business with little success.<sup>292</sup> "The insurance business in Rhode Island made its debut formally in 1784, when sixteen Newport merchants [formed] . . . the Newport Insurance Company."<sup>293</sup> And years before the American Revolution, private investors in Boston supported merchant-underwriters who pitched marine insurance.<sup>294</sup>

Although the colonial merchants sold some marine insurance and made small profits, there is general consensus that British insurers were the major insurers as well as the primary sellers of marine insurance in America before the War of Independence.<sup>295</sup> Of course, this means that

288. EDWIN J. PERKINS, *AMERICAN PUBLIC FINANCE & FINANCIAL SERVICES, 1700-1815* 284 (1994).

289. See WILLIAM H. A. CARR, *PERILS: NAMED AND UNNAMED—THE STORY OF THE INSURANCE COMPANY OF NORTH AMERICA* 37 (1967) (stating, "There were about fifty men who wrote marine insurance, almost all of them as a sideline to other business activity, during the first decade after the war.").

290. ROBERT A. EAST, *BUSINESS ENTERPRISE IN THE AMERICAN REVOLUTIONARY ERA* 23 (Peter Smith 1964 (1938)). See CARR, *supra* note 289, at 37 (stating, "Next door [to the Old Insurance Office on Fronts and High Streets in Philadelphia] was another [marine insurance] office maintained as a sort of agency for the New York underwriters.").

291. PERKINS, *supra* note 287, at 95 ("The most important commercial center in the south was Charleston, South Carolina.").

292. CARR, *supra* note 289, at 36 ("[Among the American settlers,] insurance was being written only by individual entrepreneurs in America until 1735, when the Friendly Society for Mutual Insurance was organized in Charleston, South Carolina, only to fail fifteen years later.").

293. COUGHTRY, *supra* note 229, at 92.

294. See, e.g., EAST, *supra* note 290, at 23-24 (stating, "There was a group of marine insurance investors established in Boston for many years before the Revolution as the 'office' of Ezekiel Price, secretary to three provincial governors. Another Boston office was that of Edward Payne.").

295. Carr, *supra* note 289, at 38 ("[T]he insurance market was primarily in London, because the American underwriters, joining together in a syndicate, could not write more than \$25,000 coverage. The London underwriters were able to cover very large risks."). See also Julia Hollister, *The Changing Skyline of Insurance Careers*, CALIFORNIA JOB JOURNAL, Nov. 26, 2000 available at [http://www.jobjournal.com/article\\_full\\_text.asp?ar-](http://www.jobjournal.com/article_full_text.asp?ar-)



British firms were the primary underwriters for American merchants who participated in the slave trade, from the very beginning to the height of that terrorizing enterprise.<sup>296</sup> After the Revolution, however, American firms became the chief marine underwriters in the new nation.

In fact, the very first stock, marine insurance company the Insurance Company of North America (INA) began in 1792. A group of investors gathered in Independence Hall in the same room “[where] the Declaration of Independence had been signed and the federal Constitution drafted five years earlier”<sup>297</sup> and agreed to start the company. As of this writing, INA still exists as part of CIGNA insurance group.<sup>298</sup> And like their British counterparts before the Revolution, INA and other American underwriters secured the bulk of the insurance business in this country after Independence.<sup>299</sup> Most definitely, American insurers’ assumed a variety of risks associated with maritime commerce, including underwriting the transatlantic slave trade.<sup>300</sup>

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tid=66.html (last visited Nov. 29, 2003) (noting, “Marine insurance in the colonies was handled largely by companies in the mother country until after the Revolution.”); Robert D. Wurtz, *A Short History of Insurance or How Long Have They Been Getting Away With This?* [http://www.aegis\\_corporation.com/aegis/articles/historyofinsurance.html](http://www.aegis_corporation.com/aegis/articles/historyofinsurance.html) (visited May 12, 2002) (stating, “The American colonies, prior to the Revolution, were generally insured by British underwriters employing agents in major maritime cities.”).

296. See COUGHTRY, *supra* note 229, at 92 (writing, “Prior to 1750, Rhode Island voyages were underwritten, for the most part, outside the colony. London houses seem to have been the chief underwriters. The London houses of Hayley and Hopkins and Tomlinson and Trecothick handled many Rhode Island African risks before 1776.”).

297. See CARR, *supra* note 289, at 41 (noting, “The meeting was held in the east room of the State House, better known today as Independence Hall. INA was born, the first stock marine company in the United States.”).

298. See About Cigna History, *available at* <http://www.cigna.com/general/about/history/roots.html> (last visited Nov. 29, 2003).

CIGNA was formed in 1982. Our name mixes the letters INA and CG together. Like a strong and healthy tree, CIGNA has deep roots. The histories of our two main predecessors, the Insurance Company of North America (INA) and Connecticut General Life Insurance Company (CG), reach back to earlier centuries. INA was founded in 1792 in Philadelphia after meetings in Independence Hall. The organizers were merchants and other prominent citizens who sought to protect ships, cargoes, warehouses and homes through a company offering marine and fire insurance. *Id.*

299. See, e.g., MARQUIS JAMES, *BIOGRAPHY OF A BUSINESS, 1792-1942: INSURANCE COMPANY OF NORTH AMERICA* (1942) (noting that, “During the first decade after the war the Philadelphia underwriting community grew to a body of some fifty firms or individual mostly shipping men themselves. They offered considerable competition to the agents of the London companies, which cut rates to meet the challenge.”)

300. Part IV carefully explores and documents this point more thoroughly. *But see* Joseph N. DiStefano, *No Slave Coverage: Insurer Says Ace Ltd. Has Found No Evidence that Insurance Company of North America Ever Wrote Policies On Slaves or Slave Ships? Scholars Are Skeptical*, PHILADELPHIA INQUIRER, May 9, 2002, at C1, *available at* 2002 WL 19585666 (This article outlines the debate about whether INA marine-insurance division,

Therefore we ask: was the business of insurance regulated in colonial and post-colonial America? The answer is no. When Americans participated in the slave trade from the mid-seventeenth to the early eighteenth centuries, "the underwriting of marine insurance was a strictly voluntary practice . . . ."<sup>301</sup> Merchant-underwriters only had to cooperate among themselves and adhere to customary business practices. Or, stated another way, they regulated themselves, for American state and federal governments would not begin to regulate the business of insurance until the early-to-mid nineteenth century.<sup>302</sup> But unquestionably, the failure of governments to regulate insurers produced numerous abuses, crimes and deceptive practices.<sup>303</sup> More important, the failure to regulate also permitted insurers to engage in all sorts of immoral conduct like gambling<sup>304</sup> and helping slave traders to terrorize, kidnap, murder and enslave millions of African men, women and children.

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in particular, insured the transatlantic slave trade. *Id.* A definitive answer is still pending. But the charge remains: "It's absolutely impossible that they were not insuring some trip that belonged to the slave trade. They were the major insurers of maritime trade in the British West Indies," said Walter Licht, associate dean of history at the University of Pennsylvania."). *Id.* See also *This Month in CIGNA History: December? Serving a Global Economy Since 1792*, available at <http://www.cigna.com/general/about/history/december.html> (last visited Nov. 29, 2003) ("The last month of the year is filled with firsts in CIGNA's international history. Although the underwriting was done in Philadelphia, the policies written that first December were made on ships and property destined for international ports. They included the West Indies.").

301. EAST, *supra* note 290, at 23.

302. See generally Lissa L. Broome and Jerry W. Markham, *Banking and Insurance: Before and After the Gramm-Leach-Bliley Act*, 25 J. OF CORP. L. 723, 728 (2000) (outlining Massachusetts's, New York's and Pennsylvania's first attempts to regulate insurers in the early-to-mid nineteenth century). To repeat, federal efforts to regulate insurers did not occur during the transatlantic slave trade, barring the explicit anti-insurance provisions in the federal abolitions of slave trade acts. And, of course, the Supreme Court declared in *Paul v. Virginia*, 75 U.S. 168, 183-185 (1868) that the federal government could not regulate the business of insurance, as it was a state matter.

303. Cf. *Id.* (documenting that "some abuses" accompanied insurers' and underwriters' successes in early America).

304. See EAST, *supra* note 290, at 69-70 ("[The War of Independence] stimulated the organization of marine insurance groups in Boston and other New York seaports. Rates were so high that it was little more than a gambling proposition, with the cards stacked in favor of the underwriters.").

PART IV. BRITISH AND AMERICAN INSURERS AS AIDERS AND  
ABETTERS OF COMMERCIAL TERRORISM DURING THE  
TRANSATLANTIC SLAVE TRADE

A. *Insurers as Aiders and Abettors of Terrorism Before the Enactment of Anti-Slave Legislation*

The general allegation that American and British underwriters helped slave traders to practice commercial terrorism appears throughout this article. At this point, it is appropriate to ask: specifically, how did merchant-underwriters and insurance companies aid and abet the slave traders? The first and most obvious form of substantial assistance has been mentioned before: For a premium, American and British underwriters sold marine insurance and accepted "all perils" associated with slave trafficking.<sup>305</sup> They agreed to reimburse shipowners, slave traders and slave owners, when a covered peril caused a financial loss. More astonishing, when slave traders could not afford to pay exorbitant or even reasonable premiums, which was okay. Insurers simply loaned the money to pay the premiums.<sup>306</sup> That arrangement nearly always ensured the availability of marine insurance to underwrite slavers' terrorism.

Also, it was common for captains and crew members on slave ships to receive a few "privilege slaves" instead of money as compensation;<sup>307</sup> therefore, before a voyage, marine underwriters or their agents agreed to insure crew members' property and to make reimbursements if the "privilege slaves" died before or after reaching the final destination.<sup>308</sup> Fur-

305. See *Lockett v. Merchants' Ins. Co. of New Orleans*, 10 Rob. 339 (1845) available at 1845 WL 1472, \*1 (La.).

This was an action to recover \$10,000, the insurance upon fifteen slaves. The policy provides that the company take upon themselves the risks of 'takings at sea, arrests, restraints, and detentions of all kings, princes, or people of what nation, condition or quality soever, barratry of the master or mariners, and all other perils, losses, or misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandize, or any part thereof, to which assurers are liable for.' *Id.*

306. See COUGHTRY, *supra* note 229, at 100-01 (stating that "Marine insurance was an expensive but vital prerequisite of any maritime trading venture [S]laver insurance [was] a burdensome expense. Insurance companies recognized the financial strain that such an investment would cause, and made it a common practice to provide their customers with loans to cover all of part of the premium.").

307. See, e.g., ELIZABETH DONNAN, DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF THE SLAVE TRADE TO AMERICA 247 (Vol. 3 1965). "Captain Briggs went off and viewed his slaves [which included] a great proportion of privilege and males slaves [We offered] to sell his privilege free of [c]ommission.") Privilege is defined as "slaves belonging to [the] captain, doctor, and mates. The usual proportion for the captain was four of every 104 [slaves] carried." *Id.* at 247 n.3.

308. See, e.g., *Robertson v. Ewer*, 99 Eng. Rep. 1011 (1786).

This was an action on a policy of insurance on the ship '*Dumfries*' from London to the coast of Africa, during her stay and trade there, and at and from thence to her port or ports

thermore, captains and other crewmembers often died at sea from a variety of perils slave insurrections, diseases, and natural causes.<sup>309</sup> For that reason, they would instruct an agent to secure life insurance before a voyage commenced. Of course, underwriters would readily take the premiums, promising to pay proceeds when the insured died. But after the insured's death, insurers often refused to compensate beneficiaries or survivors.<sup>310</sup>

Arguably, the ability to contract for life and property insurance helped to motivate a large number of captains and seamen those looking for both adventure and a modest amount of financial security to participate in the slave trade. Seamen, however, certainly knew that slave voyages and trade were exceptionally risky<sup>311</sup> commercial enterprises, especially since both involved murdering, shackling, maiming, terrorizing and enslaving millions of uncooperative innocents. Also, the evidence is incontrovertible. The ability to purchase insurance encouraged many otherwise reluctant merchants and squeamish investors to participate in the odious trade. They appreciated the obvious: the slave trade was a combination of terrorism, abnormally dangerous natural conditions, and

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of discharge in the British West India Islands [and it] was brought to recover the amount of [seamen's] wages and provisions, in consequence of her detention under the embargo at Barbadoes. *Id.*;

Webster v. De Tastet, 101 Eng. Rep. 908 (1797).

The plaintiff [was] hired to go as a mate in a ship from the coast of Africa to the Havana, for which he was to receive wages at the rate of 5l. per month, and three privilege slaves free of expense on the ship's arriving at the port of sale — directed the defendant, who was his agent at Liverpool, to get an insurance on his privilege[.] *Id.*

309. See, e.g., *Freeland v. Glover*, 103 Eng. Rep. 177, 178 (1806).

A ship [was] on an African voyage [The] commander wrote a letter to his owners, mentioning an attack on her [by] natives, who killed the captain and several of the crew, and wounded others; [after] a fever the crew were reduced to five. This was an action on a policy of insurance. [T]he only question was whether material information had been concealed from the underwriters [at the inception of the contract.] *Id.*

310. See *King v. Glover*, 127 Eng. Rep. 603, 603 (1806).

This was an action by the Plaintiff as widow and representative of her husband — Capt. Ch King — who commanded the ship '*John*' [and was] employed in the slave trade [The suit] was commenced by her for the recovery of a loss upon a policy of insurance effected by her husband 'on his commissions, privileges, &c. as may be hereafter valued.' *Id.*

311. See RAWLEY, *supra* note 217, at 186 (explaining that "[t]he slave trade, it is plain, was a business fraught with more than normal risks, from slave mortality and insurrection, as well as from war, privateers, and pirates. The cost of conducting business was large, in procurement of cargo ships and in securing insurance."); Herman E. Krooss and Charles Gilbert, *The Rise of the All Purpose Merchant*, AMERICAN BUSINESS HISTORY, Jan. 22, 2002, (Lecture 3), at 8 (stating, "The [transatlantic slave] trade was more than ordinarily risky and not as common as other voyages."). This same information appears in Herman E. Krooss and Charles Gilbert, AMERICAN BUSINESS HISTORY (Englewood Cliff, N.J.: Prentice-Hall, Inc. 1972), chap. 3.

ultra-hazardous activities. Accordingly, insurers had to cover those perils before ordinary investors and merchants would participate.

There is a final important point. American and British insurers and their agents also participated directly in the slave trade horrors, ergo they committed terrorism. And that participation manifested itself in at least two forms. First, many wealthier merchants like the D'Wolfs<sup>312</sup> in colonial and post-colonial America were "all purpose" merchants. They owned ships; they were part-time underwriters; they sold goods to stock ships; and they financed voyages and ventures independently.<sup>313</sup> Consequently, those versatile merchants had business options. As reported earlier, they could aid and abet slave traders by selling insurance to them. As merchants-insurers-shipowners, they could participate directly in the horrors and riches of the slave trade. More often than not, they exercised the latter option<sup>314</sup> by fitting slave ships, hiring captains and crews, and giving their representatives the means to capture, terrorize and sell innocents.<sup>315</sup>

Second, enslaving and torturing blameless Africans on large plantations is the other way that underwriters participated directly in the slave trade. Simply put, underwriters owned plantations and employed agents to manage those businesses. In fact, insurers— with their agents' assistance— designed, financed and implemented various forms of terrorism

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312. See, e.g., Robertson and Kerber, *supra* note 223, at 9E (finding "nowhere did the slave-trading business flourish more than in the seaports of Rhode Island. Three generations of D'Wolfs [made] 88 voyages and [became] the nation's leading slave traders. [M]any of the ships that carried [slaves to southern plantations] were owned by Northern merchants like the D'Wolfs [who] built entire industries, from rum distilleries to insurance companies.").

313. See Herman E. Krooss and Charles Gilbert, *The Rise of the All Purpose Merchant*, AMERICAN BUSINESS HISTORY, Jan. 22, 2002, (Lecture 3), at 8, 13 (emphasizing that "[m]any of the wealthier and more successful merchants owned several ship as well as shares of others. Many merchants regarded marine insurance as so closely related to their main activity that they were almost continually involved in this activity.").

314. See, e.g., COUGHTRY, *supra* note 229, at 92-94.

The insurance business in Rhode Island made it debut formally in 1784, when sixteen Newport merchants subscribed to a marine insurance company. Out of this fledgling syndicate emerged the Newport Insurance Company [which] accepted risks on eighty-one voyages. [N]early 21 percent covered slave vessels, their cargoes, or 'private ventures' in the African trade. Prominent among the new subscribers was James D'Wolf, a leading merchant and slave trader. [M]any of the slave vessels insured by the firm belonged to company underwriters. *Id.*

315. Cf. RAWLEY, *supra* note 217, at 216-217.

Of a different nature was the slaving of John Dawson, 'possibly the world's leading slave trader.' Dawson's slaving enterprise involved ownership of many ships, use of large vessels, investments of huge amounts of capital, and maintaining agents in different parts of Africa. Of the whole Liverpool investment in ship, outfitting, and cargo, [a governmental official] estimated that Dawson owned (including insurance at 6 per cent) one-seventh. *Id.*

to control slaves, to help maximize substantial returns on the insurers' investments. To be sure, a variety of insurers— including merchant-underwriters, insurance companies and the esteemed subscribers at the prestigious Lloyd's of London — owned plantations, or had substantial shares or other interests in those institutions.

To illustrate, consider the conduct of John Julius Angerstein the purported "founder"<sup>316</sup> of the "new" Lloyd's of London.<sup>317</sup> Angerstein was perhaps the most savvy, highly regarded and extremely adept underwriter at Lloyd's.<sup>318</sup> For years, he underwrote the maritime activities for a variety of merchants, including slave traders,<sup>319</sup> but that "man of such integrity,"<sup>320</sup> also effected, sanctioned, and financed directly the enslavement and terrorization of African slaves. Put simply, Angerstein along with other underwriters at Lloyd's owned a significant share of a large plantation in Grenada.<sup>321</sup> He made a fortune as an underwriter and a slave

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316. See STRAUS, *supra* note 243, at 105 (stating "[i]t would be incorrect to call [John Julius Angerstein], as he has been called, the real founder of Lloyd's [:] but he must be accorded one of the two or three most honorable places in its history [:]").

317. See NIEKERK, *supra* note 208, at 628-629.

[T]he body of reputable and specialist underwriters and insurance brokers Lloyd's Coffee-House in the eighteenth century also attracted a large number of speculators and gamblers. [Therefore,] a group of underwriters and brokers [decided to break away] in 1769. Although [the break-away group] continued to attract a large clientele, the old Lloyd's soon experienced a drop in business and by 1785 it had disappeared. The leading figures in the establishment of the new Lloyd's in the Royal Exchange [was] John Julius Angerstein, a St. Petersburg-born merchant of German extraction. *Id.*

318. See STRAUS, *supra* note 243, at 104 (explaining that "[t]he Angersteins were merchants. [A]t an unusually early age [Julian] showed not only great commercial aptitude but also a general character of the most sterling kind. [H]e soon made his mark in the marine insurance world.").

319. See *Id.* (finding "[i]n the course of forty years Angerstein amass a considerable fortune. Such was his reputation for business acumen and stability that '[insurance] policies sanctioned by his subscription speedily acquired so great an authority that they were, by way of distinction, called 'Julians.'").

320. *Id.*

321. See Dan Byrnes, *THE BLACKHEATH CONNECTION: A WEBSITE BOOK*. Chapter 42, <http://whatson.northnet.net.au/users/blackheath/thebc43.html> (visited May 23, 2002) (emphasizing "[t]he agreement amongst Lloyd's historians is that Angerstein, who also had a West Indies plantation interest, developed a 'cabal' of underwriters."); Joan Anim-Addo, *LONGEST JOURNEY: A BLACK HISTORY OF LEWISHAM*, 42-45 (London: Deptford Forum Publishing, 1996) (reporting the John Julius Angerstein owned a third share in a slave estate on the island of Grenada).

owner,<sup>322</sup> a level of wealth that caused substantial intra-familial conflicts and a major legal battle after his death.<sup>323</sup>

More important, that Angerstein was part owner of a coercive plantation in Grenada is quite telling. Grenada is renowned for being a place where slave owners subjected free men and women to some of the most horrendous conditions and prolonged terrorism in the Western Hemisphere.<sup>324</sup> In fact, it was not beyond a Grenadian plantation owner to track a runaway slave to a free country; and while there the owner would ask a court to force the runaway to return to the terror, subjugation, and horrific conditions in Grenada.<sup>325</sup>

Undeniably, the well-regarded John Julius Angerstein and similarly situated underwriters practiced some of the worse forms of commercial terrorism.<sup>326</sup> More noteworthy, those otherwise highly esteemed, learned and refined underwriters at Lloyd's of London knew exactly what they

322. See STRAUS, *supra* note 243, at 104. See also, Simon Edge, *Charles Saatchi Paid GBP 1 Million For This Sculpture. You Could Buy The Original Toy For GBP 14.99. So Who's The Fool?* THE EXPRESS, May 2, 2000, (finding "[The British] National Gallery was started in 1824 from the private collection of a financier called John Julius Angerstein.").

323. See, e.g., Angerstein v. Martin, 37 Eng. Rep. 1087, 1088 (1823).

The testator [John Julius Angerstein] died on the 29th of January 1823, leaving John [Julius Williams] Angerstein his only son; The testator at the time of his death possessed a very large personal estate. The bill was filed by John [Julius Williams] Angerstein, within a year after the death of the testator, against his children. [In the will, they were listed as] the tenants for life in remainder. *Id.*

324. Cf. Andrew Purvis, *Travel: Eat With the Locals? Yum!*, THE DAILY TELEGRAPH, Dec. 12, 1999, at 23 (stating, "[E]at as the locals did 200 years ago, when armadillo, sea eggs and breadfruit stew were eaten by plantation slaves so undernourished that they took whatever sustenance they could get. It may be a part of Grenada's culinary history, but perhaps it is a history some people wish to forget."); Ottobah Cugoano, NARRATIVE OF THE ENSLAVEMENT OF OTTOBAH CUGOANO, A NATIVE OF AFRICA, 120-121 (Published by himself, 1787), available at <http://docsouth.unc.edu/neh/cugoano/cugoano.html>.

I was early snatched away from my native country, with about eighteen or twenty more boys and girls, as we were playing in a field [W]e were kidnapped, and as we were decoyed and drove along, we were soon conducted to a factory, and from thence, in the fashionable way of traffic, consigned to Grenada. Some of us attempted, in vain, to run away, but pistols and cutlasses were soon introduced, threatening, that if we offered to stir, we should all lie dead on the spot. *Id.*

325. Cf. Williams v. Brown, 127 Eng. Rep. 39, 40 (1802).

The Plaintiff was a Negro [;] in November 1797, [he] entered at London on board the '11 Holderness,' bound for Grenada, as an ordinary seaman. On the arrival of the '11 Holderness' at Grenada the Plaintiff was claimed as a runaway slave by Mr. Hardman his former master, and delivered to him. When the Plaintiff was claimed in Grenada as a runaway slave, he was not only liable to be remanded to slavery, but by the laws of the island he was amenable to severe punishment for this desertion. *Id.*

326. See Charles Royster, THE FABULOUS HISTORY OF THE DISMAL SWAMP COMPANY: A STORY OF GEORGE WASHINGTON'S TIMES (New York: Alfred A Knopf, 1999) (reporting that "diverse men had come to Lloyd's [of London] like [John Julius] Anger-

were doing. Like their clients who trafficked in human cargoes, Angerstein and other underwriters at Lloyd's subjected innocents to continual and unimaginable terror and misery to guarantee wealth and commercial advantage.

B. *American and British Legislative Efforts to End the Terrors of the Transatlantic Slave Trade*

A few weeks after the destruction of the World Trade Center and the attack on the Pentagon, the Bush II administration "unleashed the first stage of its financial war on terrorism."<sup>327</sup> The Administration ordered U.S. banks to freeze the assets of a variety of organizations and individuals, especially the principals, aiders and abettors who were allegedly responsible for the September 11th attacks.<sup>328</sup> Within six weeks of those fatal attacks, Congress passed the Antiterrorism-Patriot Act of 2001.<sup>329</sup> Put simply, the Patriot Act gives the government controversial<sup>330</sup> and broad powers to stop all forms of terrorism: federal officials can arrest, prosecute, punish and seize the property of alleged terrorists and their aiders and abettors.<sup>331</sup> Actually, since the mid-1980s, Congress has en-

stein a rapidly rising young man, cutting an ever bigger figure in the Canada trade and the African slave trade [.]").

327. See Laurie P. Cohen, Glenn Simpson, Mark Maremont and Peter Fritsch, *Aiding and Abetting: Bush's Financial War On Terrorism Strikes at Islamic Charities*, WALL ST. J. Sept. 25, 2001, at A1.

328. See David L. Green, *U. S. Freezes Bin Laden Assets? Bush Acts to Cut off Flow of Money to Militant, Associates Foreign Banks Warned President Describes Executive Order as Part of War on Terror*, THE BALTIMORE SUN, Sept. 25, 2001, at A1 (noting that "President Bush warned foreign banks that he would freeze their assets and halt their financial transactions in the United States . . . [He also declared that the U.S. government will] deal with them, just like we intend to deal with others who aid and abet terrorist organizations.").

329. Pub. L. No. 107-56, 115 Stat. 272 (2001) — "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (Patriot Act) Act of 2001." See also, 148 CONG. REC. S2916-01, (daily ed. April 18, 2002) (Comment of Mr. Kyl.).

330. See, e.g., Tom Brune, *Terror Measures Draw Legal Challenges*, NEWSDAY, Jan. 30, 2002, at A14.

A lawyer for the [Global Relief Foundation] filed a lawsuit in Chicago Monday to challenge the constitutionality of a provision of the antiterrorism law, known as the USA Patriot Act, allowing the government to freeze the assets of a group suspected of aiding terrorists . . . 'The blocking of the foundation's [assets, seizure of its documents and subsequent public statements by the federal government accusing it] of ties to terrorism have violated the constitutional rights of this U.S. corporate citizen,' he said in a statement. *Id.*

331. Cf. James V. Grimaldi, *An Arab American Charitable Connection That Might Be Too Close for Comfort*, WASH. POST, Dec. 17, 2001 at E6 (explaining that "[t]he Antiterrorism Act of 1992 contains a provision that permits torts from terrorist activity to be actionable even if they occurred in a foreign country. Put another way, if [a terrorist kills



acted a number of antiterrorism statutes,<sup>332</sup> because many legislators believe that terrorism is a serious problem requiring radical measures.

Similarly, during the late 1700's and with a substantial less sense of urgency,<sup>333</sup> members of the Senate and House decided that the terrors, horrors, and inhumanity of the transatlantic slave trade had to end. Therefore, after colonial merchants had participated in the slave trade for more than a century, and about twenty years after the Declaration of Independence, Congress enacted the first anti-slave trade legislation: The Slave Trade Act of 1794.<sup>334</sup> In relevant part, it stated: "[n]o citizen or citizens of the United States . . . shall cause any ship or vessel to sail from any port . . . for the purpose of carrying on any trade or traffic in slaves. . . . [And] all and every person so . . . aiding or abetting therein, shall severally forfeit and pay the sum of two thousand dollars . . . ."<sup>335</sup>

Four years later Congress approved the Slave Trade Act of 1798.<sup>336</sup> That statute prohibited slave trafficking in the newly established Mississippi Territory; and, it also prevented anyone from aiding or abetting that commercial activity.<sup>337</sup> As punishment for violating the act, the government could seize and free the captives, and force each principal, aider and

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your son overseas], you could sue the perpetrators or people who aided and abetted the killers for compensation for your loss.").

332. See The Omnibus Diplomatic Security and Antiterrorism Act of 1986 — Pub. L. No. 99-399, 100 Stat. 853 (1986) (codified in scattered sections of 22 U.S.C. (1994)) (enacted in part to provide U.S. victims of international terrorism with a civil cause of action.); The Antiterrorism Act of 1987 — Pub. L. No. 100-204, 101 Stat. 1407 (1987) (codified at 22 U.S.C. §§ 5201-5203 (1994)) (enacted solely to impose restrictions on the Palestinian Liberation Organization (PLO) by prohibiting U.S. citizens from "receiving anything of value except information material from the PLO." *Id.* § 5202. This act also made it unlawful to establish "an office or other facilities" that furthered the interests of the PLO.) *Id.*; The Antiterrorism Act of 1990 — Pub. L. No. 101-519, 104 Stat. 2250 (1990) (codified at 18 U.S.C. §§ 2332, 2333-2338 (1994)); The Antiterrorism Act of 1992 — Federal Courts Administration Act, Pub. L. No. 102-572, §§ 1001-1003, 106 Stat. 4506, 4520-24 (1992) (amending 18 U.S.C. §§ 2331-2338 (1994) (enacted to create a cause of action for U.S. victims of international terrorism)).

333. Cf. *Editorial? Proceed With Caution*, DENVER POST, Oct. 26, 2001, at B6 (reporting that when "[v]iewed against the normal glacial pace of legislation, Congress acted with break-neck speed too speedily, some civil libertarians say to grant Attorney General John Ashcroft new tools [Under the USA Patriot Act] in the war against terror.

334. 3d Cong., ch. 11 (1st Sess. 1794).

335. *Id.* at §§ 1-2.

336. 5th Cong., ch. 28 (2d Sess. 1798).

337. *Id.* at § 7 ("[I]t shall not be lawful for any person or persons to import or bring into the Mississippi territory, from any port or place or to cause or procure to be so imported or brought, or knowingly to aid or assist in so importing or bringing any slave or slaves.").

abettor to pay three hundred dollars for each slave.<sup>338</sup> Congress soon discovered, however, that the Acts of 1794 and 1798 were impotent, even though both acts clearly banned all principals and their secondary supporters from terrorizing, intimidating and enslaving innocent Africans. Clever lawbreakers — driven by excessive financial greed — soon learned how to circumvent the prohibitions under both statutes. For example, American merchant-slavers started purchasing the services of foreigners and foreign ship owners.

Therefore, within three years of passing the 1798 act, Congress ratified two additional statutes. The Slave Trade Act of 1800<sup>339</sup> prohibited American citizens and foreign residents from securing a property interest in any slave trade vessel.<sup>340</sup> Furthermore, it outlawed American citizens' voluntary service on slave ships.<sup>341</sup> What were the penalties for violating this act? First, the Act of 1800 authorized the U.S. Navy to seize and secure the vessels and cargo except the slaves as prizes.<sup>342</sup> More astonishingly, for the first time in three-hundred-plus years, a person could go to prison for practicing this form of commercial terrorism.<sup>343</sup> The individual could also receive a stiff fine.<sup>344</sup> Finally, Congress enacted the Slave Trade Act of 1803;<sup>345</sup> it was designed especially to deter and punish masters and captains who served on slave ships.<sup>346</sup> That legislation also al-

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338. *Id.* ("[E]very person so offending, and being convicted before any court within the said territory, shall forfeit and pay, for each and every slave so imported or bought, the sum of three hundred dollars; and every slave so imported or bought, shall become entitled to, and receive his or her freedom.").

339. 6th Cong., ch. 51 (1st Sess. 1800).

340. *Id.* at § 1 ("[It] shall be unlawful for any citizen of the United States, or [for] other person residing within the United States to have any right or property in any vessel employed in the transportation of slaves from one foreign country or place to another.").

341. *Id.* at § 2 ("[It] shall be unlawful for any citizen of the United States, or [for] other person residing therein, to serve on board any vessel of the United States employed in the transportation of slaves from one foreign country to another [.]").

342. *Id.* at § 4 ("[It] shall be lawful for any commissioned vessels of the United States to seize and take any vessels employed in [the slave] trade business or traffic; and such vessel, together with her tackle, apparel and guns, goods and effects, other than slaves shall be condemned for the use of the officers and crew of the vessel making the seizure.").

343. *Id.* at § 2 ("[Any] citizen or other person [who] voluntarily [serves on a slave-trade vessel] shall be liable to be indicted, and [shall] be imprisoned not exceeding two years.").

344. *Id.* ("[On] conviction, [the guilty party] shall be liable to a fine not exceeding two thousands dollars.")

345. 7th Cong., ch. 10 (2d Sess. 1803).

346. *Id.* at § 1 ("[No] master or captain of any ship or vessel, or any other person, shall import or bring any [N]egro, mulatto or other person of colour into any port of place of the United States.").

lowed the government to impose hefty fines. If convicted, the criminals had to pay one thousand dollars for each slave on the ship.<sup>347</sup>

But attempts to enforce those initial anti-terrorism acts were highly ineffective; consequently, slave traders, along with their aiders and abettors, continued to terrorize murder and kidnap persons unwilling to live in bondage. Then, with the same pronounced sense of urgency and determination that it displayed when enacting the Patriot Act of 2001,<sup>348</sup> Congress passed the comprehensive Slave Trade Act of 1807.<sup>349</sup> Like the Patriot Act, the Act of 1807 was a comprehensive anti-terrorism statute, one designed to totally abolish the horrors of the transatlantic slave trade.

Among its many provisions, the 1807 act gave the federal government broad authority to gather intelligence and conduct surveillances.<sup>350</sup> Federal officials also received other sweeping enforcement powers under the act: 1) the clout to search, seize and make use of suspects' tangible and intangible property,<sup>351</sup> 2) the authority to hunt, deter, detain, arrest and prosecute terrorists,<sup>352</sup> and 3) the power to fine and send convicted slave traders to prison for terrorizing and enslaving innocent civilians.<sup>353</sup> More

347. *Id.* ("[If] any captain or master [violate this statute], he shall forfeit and pay the sum of one thousand dollars for each and every [N]egro, mulatto, or other person of colour . . . brought or imported. . . .").

348. See Lubet, *supra* note 148, at 21.

In nearly every public pronouncement, the Bush administration has emphasized that this will be a 'different kind of war' [against our enemy,] an international terrorist network . . . . [B]ut it turns out that it is not completely unprecedented. History has seen at least one other protracted military campaign against as murderous international network that victimized innocent civilians. We can draw an analogy between 19th Century slave traders and 21st Century terrorists, and not only because both targeted innocent populations. To defenseless men and women in chains, what was slavery if not a form of terror?" *Id.*

349. Act of Mar. 2, 1807, ch. 22, 2 Stat. 426.

350. *Id.* at § 7 ("And it shall be lawful for the President of the United States, and he is hereby authorized, to cause any of the armed vessels of the United States to be manned and cruise on any part of the coast of the United States, or territories where he may judge attempts will be made to violate the provisions of this act.").

351. *Id.* ("And the proceeds of all ships and vessels [including] the goods and effects on board of them, which shall be so seized, prosecuted and condemned, shall be divided equally between the United States and the officers and men who shall make such seizures [and distributed as prize].").

352. *Id.*

[The President of the United States may] instruct and direct the commander of armed vessels of the United States to seize and bring into any port of the United States all ships or vessels of the United States, wheresoever found on the high seas . . . . [And] the captain, master, or commander of very such ship or vessel . . . shall be deemed guilty of a high misdemeanor, and shall be liable to be prosecuted before any court of the United States, having jurisdiction. *Id.*

353. *Id.* at § 5.

[If] any citizen or citizens shall take on board and ship or vessel any [N]egro, mulatto, or person of colour, with the intent to sell him, her, or them [as] a slave such offender shall be

important, the Act of 1807 like its precursors and the Patriot Act of 2001 gave federal officials far-reaching authority to capture, prosecute and punish aiders and abettors. The government could punish 1) secondary supporters who helped to prepare slave voyages and ventures,<sup>354</sup> and 2) those that gave substantial assistance during the voyages and ventures.<sup>355</sup>

Did the American anti-slave trade statutes clearly target insurance companies and outlaw their immoral and offensive activities? The answer is no. The explanation, however, is not complicated. As reported earlier, the "all purpose" merchants comprised the vast majority of the business community in America, immediately before and years after Independence. To repeat, they owned and fitted ships, sold and bought slaves, and underwrote the slave trade. Therefore, under every act, Congress explicitly targeted all merchants, including those who sold insurance to the commercial terrorists. Without doubt, in light of their undeniable involvement in the slave trade, the "all purpose" merchants were either amateur terrorists, or recreational aiders and abettors of terrorism.

The British Parliament, on the other hand, focused its attention immediately and carefully on stopping merchant-underwriters and insurance companies from financing the slave trade. By now, the reason should be fairly obvious: when Britain enacted its first anti-slave trade legislation An Act for the Abolition of the Slave Trade, 1807,<sup>356</sup> its insurers had been underwriting the terrors of the slave trade for more than two-and-a-half centuries.<sup>357</sup> As a consequence, members of the Houses of Lords and Commons understood better than members of the United States

deemed guilty of a high misdemeanor, and [after conviction] shall suffer imprisonment for not more than ten years nor less than five years, and [shall] be fined not exceeding ten thousand dollars, nor less than one thousand dollars. *Id.*

354. *Id.* at § 3 ("[All] and every person so building, fitting out, equipping, loading, or otherwise *preparing or sending away any ship* or [in] any ways aiding or abetting therein shall severally forfeit and pay twenty thousands dollars.") (emphasis added).

355. *Id.* at § 4 ("If any citizen or citizens of the United States, or any person shall take on board, *receive or transport from any of the coasts or kingdoms of Africa* or shall be in any ways aiding or abetting therein, such citizen or citizens, or person pay five thousand dollars.") (emphasis added.).

356. An Act for the Abolition of the Slave Trade, 1807, 47 Geo. III, c. 36, Sess. 1 (Eng.).

357. Cf. William Wood, *ELIZABETHAN SEA-DOGS; A CHRONICLE OF DRAKE AND HIS COMPANIONS*, 59-60 (Yale Univ. Press, 1918).

Shakespeare's 'Putter-out of five for one' was a typical Elizabethan speculator exploiting the riskiest form of sea-dog trade Marine insurance of the regular kind was a very different thing. It was already of immemorial age . . . Lloyd's [of London] had not been heard of. But there were plenty of smart Elizabethan underwriters already practicing the general principles which were formally adopted two hundred years later, in 1779, at Lloyd's Coffee House. A policy taken out on the *Tiger* immortalized by Shakespeare would serve as a model still. *Id.*

Congress that insurance played an indispensable role in financing the fears, intimidation, and gruesome destructiveness of the slave trade. Parliament also knew that to end the terrorism, they would have to do what the Bush administration did after the September 11th terrorists attacks impose fines, prosecute, and send both principals and secondary supporters to prison and launch a serious attack "on the financial foundation of the global terror network."<sup>358</sup>

The language of the British 1807 Act, therefore, is very expansive and clear: "[i]t shall be unlawful for any of His Majesty's Subjects, or any Person, or Persons resident within the United Kingdom, or any of the Colonies . . . to carry away or remove, or knowingly and willfully to procure, aid, or assist in the carrying away or removing as Slaves . . . any of the Subjects or Inhabitants of Africa[.]"<sup>359</sup> More significant, it stated: "[F]rom and after [May 1, 1807], all *Insurances* whatsoever. . . in respect to any of the trading, dealing, carrying, removing, transshipping [of slaves]. . . shall be. . . prohibited and declared. . . unlawful."<sup>360</sup> What were penalties for violating the 1807 anti-insurance provision? They were only monetary and nominal. Consequently, they were not sufficiently effective to stop insurance underwriters' secondary activities.<sup>361</sup>

Consequently, seventeen years later, Parliament passed the Slave Trade Act of 1824.<sup>362</sup> The Act contained exceptionally sweeping and unprecedented enforcement measures to stop slave traders' terrorism and the vital financial assistance that they received from insurers. First, the act declared "[i]t shall not be lawful . . . for any persons [to insure or to contract for the insuring of any slaves, or any property, or other subject matter relating] to the dealing, trading, purchase, sale, barter or transfer of slaves."<sup>363</sup>

Then British legislators strengthened the civil-penalty provision, which appeared in the Act of 1807. The new provision stated in relevant part: "if any person shall knowingly and willfully insure or contract for the insuring of any slaves, . . . [or any subject matter related to the slave

358. David L. Green, *U. S. Freezes Bin Laden Assets? Bush Acts to Cut off Flow of Money to Militant, Associates Foreign Banks Warned President Describes Executive Order as Part of War on Terror*, THE BALTIMORE SUN, Sept. 25, 2001, at A1.

359. An Act for the Abolition of the Slave Trade, 1807, 47 Geo. III, Sess. 1, § 3 (Eng.).

360. *Id.* at § 5.

361. *Id.* If any of His Majesty's Subjects, or any Person within this United Kingdom shall knowingly and willfully subscribe, effect, or make, or cause or procure to be subscribe, effected or made any such unlawful *Insurances or Insurance*, he or they shall forfeit and pay for every such Offense the Sum of One hundred Pounds for every such insurance; and also Treble the Amount paid or agreed to be paid as the Premium of any such insurance. *Id.*

362. The Slave Trade Act, 1824, 5 Geo. 4, c. 113 (1824) (Eng.).

363. *Id.* at § 2.

trade], . . . the person so offending, and . . . their aiders, and abettors shall . . . pay for every such offense the sum of one hundred pounds . . . for every such insurance contract . . . and treble the amount of the premium of any such insurance or contract for the same . . . . [And] every such insurance shall be absolutely null and void."<sup>364</sup>

Finally, Parliament inserted an astonishingly broad criminal-sanction clause to communicate that the British government was extremely serious about stopping slave traders' as well as their aiders' and abettors' horrifying and appalling commercial activities. In its most pertinent part, the criminal-penalty provision stated "[i]f any persons shall deal or trade in, purchase, sell, barter, or transfer, or contract for dealing or trading . . . in slaves, . . . or shall knowing and willfully insure or contract for the insuring of any [slave], . . . the person or persons so offending, and their procurers, counselors, aiders, and abettors . . . are hereby declared to be felons, and shall be transported beyond seas for a term not exceeding fourteen years, or shall be confined and kept to hard labour for a term not exceeding five years, nor less than three years, at the discretion of the court before whom such offender or offenders shall be tried and convicted."<sup>365</sup>

Did the Slave Trade Act of 1824 immediately terminate slave traders' and underwriters' terrorism? The answer is a reverberating no. In fact, over the next fifty-five years, Parliament had to enact four additional statutes<sup>366</sup> to stop merchants' chilling, outrageous and painful savagery. What did British underwriters do after Parliament enacted an array of anti-terror legislation? Like their American counterparts, they continued to aid and abet terrorism.

364. *Id.* at § 8 (emphasis added).

365. *Id.* at § 10 (emphasis in the original).

366. See The Slavery Abolition Act, 1833, 3 & Will. 4, c. 73 § 12 ("After 1st August 1824, all slaves in the British colonies shall be emancipated, and slavery shall be abolished throughout the British possessions abroad."); The Slave Trade Act, 1843, 6 & 7 Vict. c. 98 (confirming that Parliament established this "act for the more effectual suppression of the slave trade." It reads in pertinent part: "All the provisions of the Slave Act [of] 1824 shall be deemed to extend and apply to British subjects wheresoever residing."); The Slave Trade (East African Courts) Act of 1873, 36 & 37 Vict. c. 59, § 3 ("All jurisdiction is [hereby] conferred [on the East African courts], in regard to vessels seized by the commander or officer of any of Her Majesty's ships on suspicion of being engaged in or fitted out for the slave trade."); The Slave Trade (East African Courts) Act of 1879, 42 & 43 Vict. c. 38, § 4 (This was an act to amend the Slave Trade (East African Courts) Act of 1873. It stated in relevant part: "Each of the East African courts shall have the same jurisdiction in regard to a British vessel seized on suspicion of being engaged in or fitted out for the slave trade, and to the persons, slaves, goods, and effects on board thereof.").

C. *Insurers as Aiders and Abettors of Terrorism After the Enactment of Anti-Slave Trade Legislation*

As of this writing, a significant political and financial controversy is brewing in the United States; it involves charges that defunct and presently viable American insurance companies made huge profits by financing the terror, wretched conditions and human degradation, which were major pillars of the transatlantic slave trade. As reported earlier, the Insurance Company of North America (INA) presently CIGNA formed in Philadelphia in 1792. It was the first major marine-insurance, stock company in America. Therefore, legal and business historians, slave descendants and an array of lawyers are asking “did INA . . . profit from slavery by insuring masters against the loss of their slaves”?<sup>367</sup> According to INA officials, the answer is no. As mandated under a newly enacted California’s statute, INA’s archivists examined the company’s historical records. The company reported: their research did not uncover any “evidence [that INA] ever insured slaves or slave ships . . . [or that even one of its prominent insureds] ships carried slaves.”<sup>368</sup>

Arguably, the Insurance Company of North America and its archivists’ conclusions are highly unsound at best and at worse disingenuous. To repeat, the U.S. Slave Trade Act of 1794 clearly prohibited all shipowners from taking on board, receiving, or transporting *any humans as slaves*; and, it also forbade any person or business from aiding and abetting such activities in any manner.<sup>369</sup> Yet, thirteen years after Congress passed the 1794 act and just five weeks before Congress enacted the fourth anti-slave trade act in March of 1807, INA deliberately ignored the intent and spirit of those anti-terror statutes, broke the law, and insured a ship named

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367. DiStefano, *supra* note 300, at C1 (noting that “[i]n recent years, activists in the slavery reparations movement [want] U.S. corporations to pay damages to slave descendants [and they repeat the charge that INA ‘insured many of the American slave traders.’] They hoped to learn more about INA’s role through California’s Slavery Era Insurance Policies Act, which requires insurers doing business in the state to report old slave policies.”).

368. DiStefano, *supra* note 300, at C1.

Ace Ltd bought INA two years ago . . . . [Recently], California released a summary of Ace’s findings. Ace said that its hired archivists and historians, whom it declined to name, found INA ‘did not write or carry any life insurance policy written on the life of a slave.’ . . . Ace [’s] spokeswoman Lisa Fleishman-Hicks says archivists compared INA marine insurance records with a Harvard University list of 27,000 slave ships and ‘determined that it did not write or carry any policies on known slave vessels.’ (emphasis added) *Id.*

369. 3rd Cong., ch. 11, §§ 1-2, 4 (1st Sess. 1794).

*Margaret*.<sup>370</sup> She was illegally transporting slaves among other contrabands.<sup>371</sup>

Certainly, the Insurance Company of North America was not the only insurer that continued to aid and abet the terrorization and trafficking of slaves after Congress outlawed such inhumanity.<sup>372</sup> For example, three years after members of the House and Senate ratified the comprehensive Slave Trade Act of 1807, the Union Insurance Company of South Carolina intentionally violated that statute's aiding and abetting provision. The company insured the slave ship, *San Carlos*.<sup>373</sup> In fact, Union knew the ship's voyage would take it to the coast of Africa, where the British Navy was patrolling in order to stop slave traders from committing any further terrorist acts, such as capturing, branding, and shackling innocent humans and forcing them into disease-infested and life-threatening hulls of ships.

370. *Schwartz v. Ins. Co. of N. Am.*, 6 Binn. 378, 388 (Pa. 1814).

This action was brought by I. F. Schwartz and A. I. Schwartz on a policy of insurance for 20,000 dollars made the 19th January 1807, on the ship *Margaret* valued at 25,000 dollars, at and from *Batavia* to *Baltimore*, with the usual liberty of touching and trading for refreshments, warranted American property, proof to be made in Baltimore only, premium 7 ½ per cent. *Id.*

371. *Id.* at 378.

The *Margaret*, belonging to the plaintiffs who were American citizens, sailed from Baltimore on her outward voyage in March 1804, laden principally with gunpowder and *other contraband articles*. Afterwards [and] under [the] date of 9th November 1806, [the plaintiffs] wrote that the return cargo would probably amount to 73,000 dollars, and requested insurance to be made accordingly. The rest of the cargo belonged to Arnold; but in order to cover it from British capture, the whole cargo was apparently to belong to the plaintiffs; in March 1807, the ship sailed from Batavia bound to Baltimore, having Arnold, his daughter, and six slaves on board as passengers. (emphasis added) *Id.*

372. See also *McCargo v. New Orleans Ins. Co.*, 10 Rob. 202, 314 (La.) (recounting that "[t]he petitioner allege[d] that defendants did, by a policy dated at New Orleans, the 16th November, 1841, . . . [insure] from Norfolk to New Orleans, [twenty-six] slaves belonging to him, valued at \$800 each, shipped on the brig Creole."); *Lockett*, 10 Rob. at 339 (explaining "[t]his was an action to recover \$10,000, the insurance upon fifteen slaves, valued equally, at and from Richmond to New Orleans, shipped on the brig Creole, on the same voyage as those insured in the case of *McCargo v. The New Orleans Ins. Co.*, 10 Rob. 202 (La.), [it appears there were 135 slaves on board].").

373. See *Henry Messonier v. Union Insurance Company, of Charleston*, 13 Rich. 155, 156 (S.C. Const. App.).

This was an action on two policies of Insurance, dated the 13th and 15th September, 1810 on the *Spanish brig San Carlos* and her cargo. On the cargo, valued, from Teneriffe to the coast, at thirty-three and a half per cent more than the costs, and valuing the return cargo, viz: each slave at \$150, *other articles* at costs and charges, insured to sail from Teneriffe to the coast of Africa, and during her stay and trade there for four months, and from thence to the Havanna. *Id.*



Nevertheless, Union insured the *San Carlos* anyway. More telling, the insurer forced the slavers to pay excessively high premiums,<sup>374</sup> because the company knew the likelihood of a seizure was substantial.<sup>375</sup> Without doubt, Union's action was a bold, calculated and cold-blooded business decision. More astoundingly, Union underwriters committed a crime by purposefully violating both the "aiding and abetting" and the anti-insurance provisions of the British 1807 Slave Trade Act. And although Union Insurance was incorporated in South Carolina, the insurer certainly knew and fully embraced insurance customs in London;<sup>376</sup> therefore, arguably, it was completely aware of Parliament's strong opposition to any native or American insurers' continued participation in that odious and terror ridden trade.

British underwriters also continued to aid and abet slave trafficking and the torturing of innocents long after Parliament enacted various anti-slave trade statutes. To illustrate, consider the behavior of underwriters who practiced their profession on the world-renowned Lombard Street, the heart of London's financial district and the home of Lloyd's of London. Merchants in the London firm of Pinto, Perez and Associates needed insurance. On June 9, 1854, they approached some British underwriters and purchased marine insurance to cover the *Newport*, whose voyage would carry it from London to Ambriz, then, to ports on the coast of Africa.<sup>377</sup> The underwriters wrote the agreement on a standard Lombard Street application form; and they agreed that the policy would contain the usual all-risks clause.<sup>378</sup>

374. *Id.* at 158 (showing how "[the plaintiff] further proved, that seventeen and a half per cent was the highest premium paid in August, 1810, and that in consequence of the zeal and activity of the British, to prevent the slave trade, it rose in the December following, to thirty-five per cent.").

375. *Id.* at 156 (recounting that "[t]he policies contained the following clause: 'It is further agreed, that no abandonment of the neutral property shall take place in case of capture or detention by the British, until it be condemned, and the proceedings of the Court and sentence of condemnation be produced to substantiate the loss.'").

376. *Cf. Union Bank of South Carolina v. Union Ins. Co.* 1 Dud. 171 (S.C. App. Law 1838). The policy, in ascertaining and fixing the liabilities which the underwriters assure, refers to the 'laws and usages of trade in the city of London, and no other.' On such a contract, it would be enough to say, that the general average must be fixed according to the laws and usages of trade in the city of London [. . .]. The custom of the city of Charleston is in exact conformity to [the English] rule." *Id.*

377. *See Lozano v. Janson*, 121 Eng. Rep. 61, 62 (1859).

378. *Id.* at 61-2.

Touching the adventure and perils which we the assurers are contented to hear and do take upon us in this voyage, they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter mart, surprisals, takings at sea, arrests, restraints and detentions of all kings, princes and people, of what nation, condition or quality soever, barratry of the master and mariners, and of all other perils, losses and

Significantly, the London insurers did not even attempt to exclude "seizure from trafficking in slaves" as a peril insured against; and that oversight or indifference speaks volumes. In 1854, the British Navy still patrolled various coasts attempting to stop the terror of the slave trade. In the process, the Navy seized the *Newport* on suspicion that it was illegally engaged in the slave trade.<sup>379</sup> But, it should be stressed that some Lombard Street underwriters certainly did exclude "seizure for slave trafficking" as a peril insured against.<sup>380</sup> They fully understood Parliament's determination to stop underwriters from aiding and abetting the horrors of the slave trade.

Yet, those astute insurers still violated the civil and criminal provisions appearing in those anti-terror statutes. How? Like many other American and British insurers, they boldly and intentionally gave indispensable loans to slave traders throughout the centuries of the trade. Furthermore, they even helped slave traders evade the anti-terror statutes.<sup>381</sup> More egregious, American and British insurers continued to give all forms of substantial financial assistance to traders who savagely terrorized innocents. Even more telling, that assistance continued for at least seventy years after Congress and Parliament enacted numerous statutes that prohibited such activities.<sup>382</sup>

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misfortunes that have or shall come to the hurt, detriment, or damage of the said good's and merchandize, and ship, &c. or any part thereof. *Id.*

379. *Id.* at 67-68.

380. See *Heath v. Durant*, 152 Eng. Rep. 1268, 1269 (1844).

It was agreed between the defendant and the plaintiffs that the policy and the risks insured against, [should not include capture], except in case of war; and that the ship was not arrested or detained in war . . . [This] assumpsit on a policy of insurance on goods, by the ship *Virtuosa Maria Aldina*, from Geneva to the Brazils, and thence to the coast of Africa. This vessel was in fact taken by the authority of the Portuguese government, in time of peace, on the alleged ground of her being concerned in the slave trade. *Id.*

381. See COUGHTRY, *supra* note 229, at 100 (stating that, "American insurance companies even helped [African slave traders to] evade the laws against the slave trade from 1788 on, by allowing owners to sell their vessels along with slaves. [Underwriters] then extended coverage to a new vessel for the captain to pilot home.").

382. See ELTIS, *supra* note 157, at 277-78

Insurance costs during the illegal slave trade varied enormously. In the Cuban traffic between 1821 and 1836, rates were normally 15 to 30 percent of total outset costs. For the Brazilian traffic in the first decade or so after total abolition, rates were lower ? 11 percent to 15 percent, though in 1813 and 1816 when the navy was capturing ships somewhat indiscriminately, rates were temporarily in the 30 percent to 40 percent range. *Id.*;

THOMAS, *supra* note 148, at 568 (noting that, "President Thomas Jefferson signed a bill in 1807 that made it illegal to import any person of color into the United States as a slave. Shipbuilders from Baltimore even continued constructing slave ship, and underwriters still insured those ships."). See also A VIEW OF THE PRESENT STATE OF THE AFRICAN SLAVE TRADE: PUBLISHED BY DIRECTION OF A MEETING REPRESENTING THE RELIGIOUS SOCIETY OF FRIENDS IN PENNSYLVANIA, *supra* note 146, at 6 (proclaiming that, "Notwithstand-

PART V. A COMPARATIVE ANALYSIS OF BRITISH AND AMERICAN  
COURTS' DECISIONS — "UNCLEAN HANDS," ACCESS TO  
COURTS AND THE UNENFORCEABILITY OF  
ILLEGAL CONTRACTS

Shortly after the attacks of September 11th "Senate Republicans . . . tried to speed up consideration of President Bush's judicial nominees . . . by casting the need for more judges as critical in the fight against terrorism."<sup>383</sup> Certainly, whether more judges are needed to struggle against terrorism is highly debatable, even though there are pressing and legitimate concerns about future terrorists' attacks within the borders of the United States. Nevertheless, it is very likely that federal and state judges will play increasingly crucial roles, such as defining the outer limits of alleged terrorists' and their abettors' civil liberties, and deciding whether government can violate those rights and liberties under the guise of protecting the public from terrorism.

In fact, after September 11th the attorney general lobbied Congress to establish special-purpose courts to help fight terrorism.<sup>384</sup> For some members of Congress, the press and the public, creating such powerful tribunals would only "trim back civil liberties"<sup>385</sup> and guarantee "incomplete justice."<sup>386</sup> In addition, critics of the administration's plan correctly note: Like terrorists who generate fear and prevent innocent citizens

ing the prohibitory act of America, which was passed in 1807, ship bearing the American flag continued to trade for slaves until 1809[.].").

383. See Joan Biskupic, *GOP Slows Foreign Aid Bill to Speed Judicial Choices*, USA TODAY, Oct. 22, 2001, at 4A (reporting "[l]aw enforcement is going to suffer' unless the Senate's pace in deciding judicial nominations picks up, says Sen. Orrin Hatch, R-Utah . . . Hatch noted that some federal judges could end up handling key cases related to terrorism.").

384. See Neil A. Lewis, *Congress Says It Won't Rush on Anti-Terror Bills*, Denver Post, Sept. 25, 2001, at A16 (reciting that "[Attorney General John] Ashcroft said Congress should give authorities 'the tools necessary to identify, dismantle, disrupt and punish terrorist organizations before they strike again.' The administration's package would allow courts to use information gathered by foreign governments even if it was obtained by methods that would not meet U.S. constitutional standards.").

385. Cf. *Some Rights and Wrongs of Anti-Terrorism Laws*, SEATTLE TIMES, Oct. 3, 2001, at B6. Requests to trim back civil liberties imply that terrible events could have been prevented, or that existing laws and procedures were part of the problem. Neither case has been made, especially against such a disciplined foe as the Sept. 11 terrorists. Every attempt to remove judicial scrutiny or eliminate the need for a court order ought to be viewed with grave suspicion. *Id.*

386. *Editorial, Trimming the Tribunals*, S.F. CHRON., Jan. 23, 2002, at A18 (reporting "[i]t's a welcome sign that President Bush is softening the worst ingredients of military tribunals. This roughshod justice for terrorists and captured soldiers may come closer to American and international norms of fairness. Even with [the] changes, tribunals still amount to incomplete justice.").

from exercising fundamental freedoms and rights, governments which definitely includes courts have a long history of doing the same.<sup>387</sup> Or put differently, in the name of protecting innocent citizens and their fundamental rights, judicial bodies have violated those very rights, by ignoring settled principles of law and by refusing to protect citizens from the terror and tyranny of the state.<sup>388</sup>

More important, courts have a long history of re-victimizing wittingly or unwittingly already traumatized persons, by aiding and abetting the principal wrongdoer.<sup>389</sup> Fairly often, the culprits are violent persons who have a strong propensity to terrorize innocents. How can courts aid and abet terrorists and terrorism? Among other means, judges can give ter-

387. Cf. *Some Rights and Wrongs of Anti-Terrorism Laws*, *supra* note 385, at B6. Congress best serves the American people by going slow, with a tough, skeptical attitude about undoing U.S. civil liberties in the name of fighting terrorism. Our whole system of government is built around a system of checks and balances. The role of the judiciary cannot be diminished in the name of expediency. The role of Congress for oversight has never been more important. Legal protections 225 years in the making must not be subject to the whims of patriotic emotions [and] vengeful passions. *Id.*

388. Cf. J. Edgar Hoover, *Civil Liberties and Law Enforcement: The Role of the FBI*, 37 IOWA L. REV. 175, 175, 179 (1952) (noting “[w]e can have the Constitution, the best laws in the land, and the most honest reviews by the courts but unless the law enforcement profession is steeped in the democratic tradition, maintains the highest in ethics, . . . civil liberty will continually and without end be violated.”). But this is wholly unnecessary. This nation was founded on the historic principle that the individual must be protected from the tyranny of the State. Washington, Franklin and Madison witnessed the terror of a government of men.”).

389. Cf. *Entick v. Carrington*, 95 Eng. Rep. 807, 812-813 (1765). A power to issue such a warrant as this, is contrary to the genius of the law of England. The warrant is to seize all [of] plaintiff’s books and papers without exception, and carry them before Lord Halifax. What [right does] a Secretary of State [have] to see all [of] a man’s private letters of correspondence, family concerns, trade and business? These warrants are not by custom; they [date] no farther back than 80 years [.] [M]ost amazing, they have never before this time been opposed considering the great men that have presided in the King’s Bench since that time [.] [B]ut it was reserved for the honour of this Court which has ever been the protector of the liberty and property of the subject to demolish this monster of oppression, and to tear into rags this remnant of Star-Chamber tyranny. *Id.*; *Rex v. Flower*, 101 Eng. Rep. 1408, 1412 (1799) (“In the Act of the 16th Car. 1, c. 10, for abolishing the Court of Star-Chamber, one of the reasons stated is [:] [T]hat all matters examinable before them, may have their proper remedy and redress, and their due punishment and correction by the common-law of the land, and in the ordinary course of justice elsewhere.”) (emphasis added). See also *The Star Chamber*, <http://hanibal.hannotations.com/chamber.html> (last visited Nov. 26, 2003).

The Star Chamber was the historical meeting place for the King of England’s councilors. Over the years its power increased and during the reign of Henry VIII, it became more of a political weapon. Things got even worse during the reigns of James I and Charles I until the Court of Star Chamber was abolished in 1641. By then, the court had become so hated that the term Star Chamber is now synonymous with an arbitrary and oppressive tribunal, one frequently used for political ends. *Id.*

rorists and secondary supporters with their “unclean hands”<sup>390</sup> access to courts of equity, where the wrongdoers can petition for a declaration of rights, or for equitable remedies under various contracts. Or civil judges who sit in courts of law can simply ignore settled principles of law and issue highly strained, novel rulings in favor of terrorists and their abettors.

Again, Part VI presents a discussion of how American and British civil courts helped slave traders and their abettors to terrorize and violate the human and civil rights of innocent people. Of course, much of that discussion will focus on how learned judges protected the terrorists’ right to make and enforce all sorts of illegal commercial, service and financial agreements, especially insurance contracts. But more important, Part VI presents arguably compelling evidence to support the assertion: the terrors, horrors and inordinate longevity of the transatlantic slave trade would never have occurred if British and American courts had simply refused to protect slavers’ and their abettors’ right to form and enforce contracts. This part attempts to establish a firm foundation for that discussion.

#### A. *Settled English and American Common-Law Rules Against the Formation of Illegal Commercial Contracts*

Very likely, many jurists and most law students—who enrolled in the first-year contracts course during the 1990’s—are familiar with the gut-wrenching case of *Baby M.*<sup>391</sup> In early 1985, a physician artificially inseminated Mary Beth Whitehead, using William Stern’s sperm. Earlier, Mary Beth and Stern formed a \$10,000 surrogacy contract, in which Mary Beth agreed to accept artificial insemination, to conceive a child, to carry that child to term, and to surrender the child to the biological father (Stern) immediately after its birth. Mary Beth carried the child to term in 1986, but she decided to return the money, keep the baby and breach the contract. Stern sued, and, ultimately prevailed in New Jersey’s Supreme Court in 1988.<sup>392</sup>

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390. See, e.g., *Andersons v. Moncrieff*, 3 Des. 124, 3 S.C. Eq. 124 (S.C. Nov. 1810) (No. XXIII) (declaring that “[a] party coming into court, to ask equity, must come in with clean hands.”).

391. *In re Baby M.*, 537 A.2d 1227 (N.J. 1988).

392. *Id.* at 1259. [W]e have concluded, independent of the trial court’s identical conclusion, that Melissa’s best interests call for custody in the Sterns. [However, it] seems to us that given her predicament, Mrs. Whitehead was rather harshly judged both by the trial court and by some of the experts. She was guilty of a breach of contract, and [breach of] a very important promise [;] but we think it is expecting something well beyond normal human capabilities to suggest that this mother should have parted with her newly born infant without a struggle. *Id.*

To put it mildly, the Supreme Court of New Jersey received a tremendous amount of criticism from the public and the legal community nationwide.<sup>393</sup> Why? Then, as now, the law in New Jersey was painfully clear: "surrogacy contracts are illegal." They violate the state's adoption statute; they are "akin to baby selling,"<sup>394</sup> and they "violate public policy."<sup>395</sup> More important, in its decision, the New Jersey Supreme Court admitted that "the payment of money to a 'surrogate' mother was illegal, perhaps criminal, and potentially degrading to women."<sup>396</sup> Yet, the court completely ignored a settled principal of law in New Jersey: illegal contracts are void from their inception.<sup>397</sup>

As every first-year law student eventually learns, the common-law rule that the New Jersey Supreme Court so cavalierly contravened dates from an ancient period,<sup>398</sup> one that unquestionably predates the reign of Queen Elizabeth I in the mid-sixteenth century. In fact, even during the Elizabethan era, the rule regarding the unenforceability of illegal contracts was settled English law. For example, in *Fish v. Sadler*,<sup>399</sup> the court declared rather inelegantly: "when the unlawful act [begins], the illegal agreement afterwards . . . is unlawful also."<sup>400</sup> A shorter, somewhat clearer statement of the same principle appears in *Rex v. Allen*:<sup>401</sup> "the

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393. See, e.g., Golnar Modjtahedi, *Nobody's Child: Enforcing Surrogacy Contracts*, 20 WHITTIER LAW REV. 242, 274 (1998) (noting that, "The *Baby M.* court's rationale was essentially a 'parade of horrors' argument that women would start giving their children to the highest bidder without regard to what they are like."); Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. LAW REV. 127, 180 (2000) (stating, "The New Jersey Supreme Court's decision drew criticism for the court's perceived bias in favor of the Sterns' because of their economic and educational superiority to the Whiteheads."); Lois Gould and Robert Gould, *The 'Baby M' Ruling: Elegant, Flawed*, N.Y. TIMES, Feb. 10, 1988, at A-31 (reporting that, "During the *Baby M* litigation, media critic had asserted that the Sterns' ability to hire several psychological experts to testify in their favor reflected merely their wealth, not their superior parenting skills.")

394. *In re Baby M.*, 537 A.2d, at 1240-42.

395. *Id.* at 1246-50.

396. *Id.* at 1234.

397. Cf. *Vasquez v. Glassboro Service Assn., Inc.*, 415 A.2d 1156, 1162-1163 (N.J. 1980) (stating that, "Contracts have been declared invalid because they violate statutes, promote crime, interfere with the administration of justice, encourage divorce, violate public morality, or restrain trade.").

398. See, e.g., *Ferrall v. Shaen*, 85 Eng. Rep. 400, 401 (1669) (stating that, "[B]y all the authorities ancient and modern, if the lender contracts for greater interest than the statute allows [making] the agreement corrupt as the time of the loan all the assurance is void.").

399. *Fish v. Sadler*, 74 Eng. Rep. 165 (1589).

400. *Id.* at 166.

401. *Rex v. Allen*, 86 Eng. Rep. 738, 738 (1670).

corrupt agreement makes the contract void.”<sup>402</sup> In addition, early on, Parliament codified the principle in various statutes,<sup>403</sup> thereby making it applicable to the formation of illegal contracts between English subjects within and beyond Great Britain.<sup>404</sup>

Like the Supreme Court of New Jersey, colonial and all subsequent American courts embraced the English rule against legitimizing and enforcing illegal commercial agreements. For instance, as early as 1804, the Pennsylvania Supreme Court cited a string of English court decisions in *Mitchell v. Smith*,<sup>405</sup> and held: “a contract or agreement is unlawful if it . . . encourage[s] unlawful acts or omissions.”<sup>406</sup> That same year, the New York Court of Appeals underscored that view in *Belding v. Pitkin*,<sup>407</sup> stating, “[a] contract, in order to be binding, must be lawful. Whenever the consideration . . . is unlawful, the whole contract is void.”<sup>408</sup> Several years after *Mitchell* and *Belding*, other supreme courts adopted the same ruling,<sup>409</sup> which also applies to Americans and

402. *Id.* (“If there be a corrupt agreement at the time of the lending of money, then the bonds and all the assurances are void.”).

403. *See, e.g.,* *Bartlett v. Vinor*, 90 Eng. Rep. 750, 750 (1692) (Chief Justice Lord Holt’s ruling: “Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so.”).

404. *See, e.g.,* *Waymell v. Reed*, 101 Eng. Rep. 335, 336 (1794) (Chief Justice Lord Kenyon’s reaffirming: “[W]here the contract and delivery of goods are complete abroad, and the seller does no act to assist the smuggling them into this country, such a contract is valid, and may be recovered upon here. But here the plaintiff [helped] the defendants to smuggle the goods, by packing them in the manner most suitable for, and with intent to aid, that purpose. He cannot, therefore, resort to the laws of this country to assist him in carrying his contract into execution. *Id.*”).

405. *Mitchell v. Smith*, 1 Binn, 110, 2 Am. Dec. 417 (Pa. 1804).

406. *Id.* (declaring “[T]here cannot be a more express authority than [*Bartlett v. Vinor*, 90 Eng. Rep. 750, 750 (1692)] where Lord Chief Justice Holt says: ‘Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract.’”).

407. *Belding v. Pitkin*, 1804 Cai. R. 147 (N.Y. Sup. Ct.).

408. *Id.* at 149.

409. *See, e.g.,* *Wheeler v. Russell*, 17 Mass. 258, 278 (1821) *available at* 1821 WL 1489, \*12 (Mass.) (citing and embracing the New York Court of Appeals’ ruling in *Belding v. Pitkin*); *Carrington v. Caller*, 2 Stew. 175 (1829), *available at* 1829 WL 372, \*11 (Ala. 1829) (citing the Supreme Court of Massachusetts’s decision in *Wheeler v. Russell* and concluding: “Every contract against public policy, or adverse to the enactments of the legislature, is illegal and void.”); *Cheney v. Duke*, 10 G. & J. 12, *available at* 1838 WL 1975, \*5 (Md. 1838) (citing the English case *Wetherell v. Jones*, 110 Eng. Rep. 82, 84 (1832) ruling: “A contract to be void must be expressly *prohibited or declared to be void, or be ‘contrary to justice, morality, or sound policy’*”) (emphasis in the original); *Wooten v. Miller*, 15 Miss. 380 (7 S. & M. 380), *available at* 1846 WL 1700, \*4 (Miss. 1846) (holding that “[t]he principle is established beyond controversy that a contract in violation of law, or against public policy, cannot be enforced in the courts of the country.”).

foreigners making illegal contracts beyond the shores of the United States.<sup>410</sup>

B. *Settled English and American Common-Law Rules: Illegal Insurance Contracts and Insurance on Illegal Voyages*

Irrefutably, all verbal and written insurance agreements are "true" contracts. And for centuries, the English rule regarding the unenforceability of illegal contracts has been applied to insurance agreements. As early as 1795, Chief Justice Lord Kenyon declared in *Booth v. Hodgson*<sup>411</sup> that an insurance contract is void from its inception if it violates a statute.<sup>412</sup> Also, even if arguably illegal but clearly legal provisions appear in an insurance agreement, the entire contract is void from the outset. Why? In *Parkin v. Dick*,<sup>413</sup> Chief Justice Lord Ellenborough presented a simple explanation: "the illegality of such policies is a consequence of law . . . [There are] no scales to weigh degrees of illegality."<sup>414</sup> And, since the era of colonial government, every jurisdiction in America has embraced the English rule: illegal insurance contracts are void as a matter of law.<sup>415</sup>

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410. See, e.g., *Mitchell v. Smith*, 1 Binn. 110, 119-20, available at 1804 WL 966, \*7 (Pa. 1804) (citing English common law and embracing the same); *Wooten* at 1846 WL 1700, \*5 (embracing the rule that "if the contract of a foreigner is to be completed in, or has reference to its execution in foreign country, and is repugnant to the laws of that country, he is bound by them."); *Cheney v. Duke*, 10 G. & J. 12, available at 1838 WL 1975, \*10 (Md. 1838) (citing and adopting Chief Justice Lord Mansfield's rulings in the often cited English case ? *Holman v. Johnson*, 98 Eng. Rep. 1120, 1122 (1775): "[If a contract for the sale of goods was made in Dunkirk, France and the goods] were to be delivered in England where they are prohibited the contract is void.").

411. *Booth v. Hodgson*, 101 Eng. Rep. 619, 621 (1795).

412. *Id.*

By the stat. 6 Geo. 1, c. 18, "certain privileges were secured to two corporations for the purpose of insuring and lending money on bottomry. . . . [T]hough the Legislature thought it right that single individuals might make insurances, they enacted that no larger capital than that belonging to one person should be pledged to the assured, and that all policies contrary to that Act should be void. *Id.*

See also *Martin v. Sitwell*, 89 Eng. Rep. 509, 509 (1691) ("[O]ne Barksdale had made a policy of assurance upon account for five pounds premium in the plaintiffs' name, and that he had paid the said premium to the defendant, and that Barksdale had no goods then on board, and so the policy was void, and the money to be returned by the custom of merchants.").

413. *Parkin v. Dick*, 170 Eng. Rep. 1136 (1809).

414. *Id.* at 1136 ("The insurance, therefore, was clearly good for all, but the prohibited articles. . . . [But I cannot] separate one part of the subject-matter insured from the residue. This contract is entire[ly], and is wholly void.").

415. See, e.g., *Seton v. Low*, 1 Johns. Cas. 1, available at 1799 WL 511, \*\*4-5 (N.Y. 1799) (noting, "The treaty with Great Britain is, unquestionably, the law of the land, but it by no means follows from thence, that the exportation of articles contraband within its



But there is a related and equally settled English principle regarding insurance contracts; it dates at least from the Elizabethan era. Perhaps, *Goram v. Sweeting*<sup>416</sup> states and illustrates a good application of the rule. In 1669, Francis Goram an English merchant purchased insurance to cover the voyage<sup>417</sup> of a ship carrying his goods.<sup>418</sup> John Sweeting and others were the underwriters.<sup>419</sup> At the time, England was at war; and a statute prohibited English subjects from bringing goods from an enemy port without initially securing a license.<sup>420</sup> Briefly put, Goram lost his goods during the voyage and asked the insurers to indemnify. The underwriters refused; and Goram sued.

What was the underwriters' defense? They argued that the voyage was illegal from its inception, because Goram did not secure a license from the king. Most assuredly, the insurers' defense was incredible. They knew at the outset that the voyage was illegal. Yet, they insured it anyway. More surprising, the court accepted the underwriters' argument and stated several variations of the same principle: 1) any "assurance . . . on a voyage [that is] prohibited by the common law . . . is void"; 2) "[i]nsurance on a voyage prohibited by [a] statute . . . is illegal and void"; and, 3) "[a]n insurance upon any goods, the exportation or importation of which is forbidden by the King's proclamation . . . is equally void as if prohibited by statute."<sup>421</sup>

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letter, is illegal, in such a sense as to render an insurance on them void. I do not think, therefore, that on the ground of illegality, the underwriters are discharged."); *Hallet v. Jenks*, 7 U.S. (3 Cranch) 210, 211, 214 (1805) (stating, "[This was an action] upon a policy of insurance, and the only question was whether the risk insured was illegal, under the act of Congress [The attorney for the plaintiffs in error correctly stated the law]: If the insurance was upon an illegal transaction, the defendants in error have no right to recover."); *Andersons v. Moncrieff*, 3 S.C. Eq. (3 Des.) 124 (1810), *available at* 1810 WL 300, \*5 (S.C.) (reaffirming the English rule, noting that illegal insurance contracts are void and stating that courts will not assist those "where the suit is brought to recover against the insurer on [an] illegal policy.").

416. *Goram v. Sweeting*, 85 Eng. Rep. 964 (1670).

417. *See Gray v. Sims*, 10 F. Cas. 1039, 1040 (C.C.D. Pa. 1814) ("It is true, that the insurance upon the ship, is strictly an insurance upon the voyage, which, independent of the traffic in which she is engaged, may be perfectly lawful. But, [if] the traffic be forbidden by the laws of this country, the voyage, connected with such traffic, becomes on that account unlawful.").

418. *Goram*, 85 Eng. Rep. at 964.

419. *Id.* at 987.

420. *Id.* at 968 ("[It] is not lawful for a subject in time of war without the King's licence to bring goods from an enemy's port, which were purchased by his agent resident in the enemy's country, after the commencement of hostilities.").

421. *Id.* at 968-9.

During the centuries of the transatlantic slave trade, other English courts also embraced the rules<sup>422</sup> appearing in *Goram*, which are settled under English law. These are settled principles under American law, too. In 1814, the Federal District Court of Pennsylvania stated the rule this way in *Gray v. Sims*<sup>423</sup>: If a vessel engages in commerce during an insured voyage that is "contrary to the laws of this country or to the law of nations," the insurance on the ship and cargo is void.<sup>424</sup> A year later in *Hayward v. Blake*,<sup>425</sup> the Supreme Court of Massachusetts stated emphatically: "insurances upon illegal voyages are without doubt void."<sup>426</sup> Finally, in *Flanigen v. Washington Ins. Co.*,<sup>427</sup> the Pennsylvania Supreme Court reaffirmed that this settled law in originated in English common-law.<sup>428</sup>

### C. *Settled English and American Common-Law: "No Legal Action Based On Illegal Contracts"*

In 1899, the Supreme Court decided *McMullen v. Hoffman*.<sup>429</sup> Writing for the majority, Associate Justice Rufus Peckham observed: "The authorities from the earliest time to the present unanimously hold that no

422. See, e.g., *Camden v. Anderson*, 101 Eng. Rep. 792, 795-796 (1796) (Chief Justice Lord Kenyon delivered the opinion and observed: "This was an action on a policy on the ship '*Albemarle*. The [insurers'] objection [to] plaintiffs' recovering in this action was that the voyage was illegal. [T]he policy in question was effected in contravention of that Act of Parliament, as breaking in upon the monopoly granted to the East India Company; and therefore it is void."); *Tenant v. Elliott*, 126 Eng. Rep. 744, 745 (1797) (reaffirming the holding in *Camden v. Anderson*: "[An illegal] voyage makes the policy illegal also."); *Lubbock v. Potts*, 103 Eng. Rep. 174, 176 (1806) (Chief Justice Lord Ellenborough delivered the opinion and stated: "It is quite plain from the whole scope of the navigation laws that colonial produce could not legally be shipped from the plantations in the West Indies to any part of Europe except England, Wales, and Berwick. . . . [Therefore,] the shipping was illegal, and avoided the insurance on [the] voyage.").

423. *Gray v. Sims*, 10 F. Cas. 1039 (C.C.D. Pa. 1814).

424. *Id.* ("The law, therefore, considers the ship *in pari delicto* with the prohibited cargo and a policy made upon her for the voyage. . . . Any other trading, therefore, would have deprived the insured of the protection of the policy.")

425. *Hayward v. Blake*, 12 Mass. 176 (1815), available at 1815 WL 370.

426. *Id.* at 179, \*3.

427. *Flanigen v. Wash. Ins. Co.*, 7 Pa. 306 (1845), available at 1847 WL 5026.

428. *Id.* at 309, \*4. This rule has been confused by writers not attending to the distinctions of the cases. The case of vessels carrying contraband of war, are instanced — the warranty of free goods is the ground of defence. *Farmer v. Legg*, 101 Eng. Rep. (1797) is another. But that was the act of parliament, prohibiting policies on such a cargo. Another class are where the forfeiture preceded the commencement of the voyage; but there the owner's interest had vested in the crown. What is the illegality, which avoids the contract? Either where the consideration of the promise was illegal, or where the thing to be done was so. *Id.*

429. *McMullen v. Hoffman*, 174 U.S. 639 (1899).

court will lend its assistance in any way towards carrying out the terms of an illegal contract [;] . . . courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract."<sup>430</sup> Therefore, in light of the discussion appearing in the next part about British and American courts' aiding and abetting slave traders, it is important to ask: Who were the authorities? And, just how old is this rule? Does the rule pre-date the horrors of the transatlantic slave trade?

Clearly, Justice Peckham was speaking in part about English common-law judges.<sup>431</sup> On the other hand, it is more difficult to determine when the rule that bars all actions based on illegal agreements became settled law. Arguably, the principle originated and became undisputed law in the late eighteenth century, for two of the earliest English cases appearing in the *McMullen* decision date from the late 1700s.<sup>432</sup> The first one is *Holman v. Johnson*.<sup>433</sup> In that decision, Justice Lord Mansfield stated emphatically: "no [c]ourt will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."<sup>434</sup> In *Booth v. Hodgson*,<sup>435</sup> Chief Justice Lord Kenyon held: "it is the great duty of every court of justice to administer justice as well as [it] can between the litigating parties . . . . [But it] is a maxim in [English] law that a plaintiff must [show] that he stands on . . . fair ground when he calls on a court of justice to administer relief to him."<sup>436</sup> It should be observed that *Booth* involved a dispute over an illegal insurance agreement.

Before *Booth*, Chief Justice Lord Mansfield wrote many majority opinions in the 1700s; and, in several he and Lord Kenyon consistently ruled: courts will not hear controversies or award remedies if an action and allege injuries arose out of illegal<sup>437</sup> or immoral<sup>438</sup> contracts, transactions

430. *Id.* at 654.

431. *Id.* ("It is stated that Lord Kenyon once said, by way of illustration, that he would not sit to take an account between two robbers on Hounslow Heath, and it was questioned whether the legend in regard to the highwayman did not arise from that saying. It seems, however, that the case was a real one.").

432. *Id.* at 655.

433. *Holman v. Johnson*, 98 Eng. Rep. 1120 (1775).

434. *Id.* at 1121.

435. *Booth v. Hodgson*, 101 Eng. Rep. 619 (1795).

436. *Id.* at 621.

437. See *Faikney v. Reynous*, 96 Eng. Rep. 366, 367 (1767) (Chief Justice Lord Mansfield's ruling: "Where a thing is prohibited by Act of Parliament, it is void as between the parties, and no Court of Justice will allow a man to recover for what is made unlawful to be done."). See also *Steers v. Lashley*, 101 Eng. Rep. 435, 436 (1794) (Chief Justice Lord Kenyon's ruling: "[If one knows that a contract is illegal,] he cannot be permitted to recover on the bill in a court of law.").

438. See *Biggs v. Lawrence*, 100 Eng. Rep. 673, 675 (1789) (Chief Justice Lord Kenyon's holding: "Where a contract is made for smuggled goods, a party cannot come into a Court of Justice to recover on it. A person suing in a court of law must disclose a fair

or conduct. Therefore we ask: was Lord Mansfield the author of this very important "ancient" maxim? Even though "his work in developing and explaining the commercial law . . . has ensured him a foremost place among English judges [,] the answer is probably no."<sup>439</sup> Thirty-three years before Lord Mansfield's ruling in *Holman v. Johnson*, another court declared in 1734: "[w]here [a] party has paid a sum upon an illegal contract, he shall not recover it upon an action brought by him."<sup>440</sup>

Apparently, this principle was a major pillar in English law at an exceedingly earlier period, even before the reign of Queen Elizabeth in the mid-to-late 1500s. In fact, during the Elizabethan era, the rule against asking courts to enforce or to award relief under a covin<sup>441</sup> was already settled.<sup>442</sup> Once more, in 1589, the Court of King's Bench decided *Fish v. Sadler*; and the court held: all agreements to defraud or harm a third party are "abhorred in law"; as a result, courts will not hear any action arising out of such illegality.<sup>443</sup> Certainly, during the height of the slave trade in the 1600s, English courts embraced this doctrine.<sup>444</sup>

Finally, in 1826, the U.S. Supreme Court decided *Armstrong v. Toler*.<sup>445</sup> And as Chief Justice Marshall correctly observed in that decision: this "rule of universal law . . . [has] been incorporated into the civil code of

transaction; and it must not appear, from his own shewing at least, that he has infringed the laws of his country."). See also *Clugas v. Penaluna*, 100 Eng. Rep. 1122, 1123 (1791) (Chief Justice Lord Kenyon's ruling: "[T]hough the mere selling of the liquors might not be [an immoral transaction], if they were sold by a subject of this country with a view to evade the laws of this country, it savors strongly of immorality. [I]f so, it taints the whole transaction, and, payment cannot be enforced by judicial process in any Court in this country.").

439. See *BIRKENHEAD*, *supra* note 261, at 186.

440. *Bosanquett v. Dashwood*, 25 Eng. Rep. 648, 649 (1734).

441. Simply put, a covin is a secret agreement between two or more person in which they agree or promise to injure or defraud another individual. See also, Anonymous, 84 Eng. Rep. 1171 (1678) ("Fraud and covin make legal acts illegal and void.").

442. Cf. Anonymous, 21 Eng. Rep. 10 (1468-69).

[This case involves a] grand [of] lease forfeited by covin . . . [I]f a lessee for years demiseth [a] parcel of the term to another, and covinously forfeiteth his whole lease for any condition broken, and taketh the land back in lease again, his lessee shall find help in Chancery . . . And Stillington, the Chancellor (8 E. 4. 4r 1468-69)), was of opinion that [for a ] breach of promise, a man was at liberty to sue either in the spiritual court (Canonica injuriæ) or else in the Chancery, for the damage accrued by the breach. *Id.*

443. *Fish v. Sadler*, 74 Eng. Rep. 165, 166 (1589) ("[T]he plaintiff should not have judgment for that suit was begun by Sadler in the name of Collison without his privy and therefore it was unlawful. [A]nd as to the covin, it is not material, for [even] without that, the matter is illegal enough.").

444. See, e.g. *Mackaller v. Todderick*, 79 Eng. Rep. 915, 915 (1634) (holding that "the consideration was illegal, [therefore,] the action lies not; for the consideration to have money to procure him [as] rector of the church, is a simoniacal contract, and an unlawful act condemned by all laws.").

445. *Armstrong v. Taylor*, 24 U.S. 258 (1826).

every nation.”<sup>446</sup> But more important, during the entire course of the transatlantic slave trade, American courts especially those in the South recognized and stated variations of that same universal principle: 1) “[no person] shall be heard [in court] who claims the fruits, or seek the enforcement, of an illegal transaction”;<sup>447</sup> 2) “[where transactions] involve so much moral guilt, . . . courts of justice [will] not suffer themselves to be polluted with them directly or indirectly”;<sup>448</sup> 3) “[an illegal and void contract cannot] be enforced in a court of equity”;<sup>449</sup> and, 4) “courts of justice will not open their forums to enforce contracts which are illegal, immoral, prohibited, or contrary to public policy.”<sup>450</sup>

PART VI. ACCESS TO COURTS AND JUDICIAL REMEDIES FOR  
COMMERCIAL TERRORISTS AND THE INSURERS WHO AIDED  
AND ABETTED THEM DURING THE  
TRANSATLANTIC SLAVE TRADE

As documented earlier in this article, commercial terrorism is just as prevalent, old and violent as state-supported or state-sponsored terrorism. Moreover, the unspeakable and diverse horrors of the transatlantic slave trade are arguably the quintessential representations of commercial terrorism. Therefore, at this point, it is appropriate to ask: how did American and English judges aid and abet commercial traders, merchant-underwriters and insurance companies during the transatlantic slave trade? Or stated more specifically, did those jurists' rulings encourage slave traders to murder, terrorize and enslave millions of innocents during a span of three-plus centuries? Substantial convincing evidence establishes conclusively that American and British judges' declarations and remedies encouraged and prolonged the terrors of the slave trade.

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446. *Id.* at 265 (An expansive listing of English and American courts' decisions appear in Footnote B.).

447. See *Wheeler v. Russell*, 17 Mass. 258, available at 1821 WL 1489, \*12 (1821). “No principle of law is better settled than that no action will lie upon a contract made in violation of statute, or a principle of the common law.” *Id.*, at \*14.

448. *Andersons v. Moncrieff*, 3 S.C. Eq. 124 (3 Des. 124), available at, 1810 WL 300, \*5 (1810).

449. *Outon v. Rodes*, 10 Ky. 432, available at, 1821 WL 1122, \*2 (1821).

450. *Carrington v. Callier*, 2 Stew. 175, available at, 1829 WL 372 \*19 (1829); see also *Belding v. Pitkin*, 2 Cai. R. 147, available at, 1804 WL 813, \*3 (1804) (“It is well settled that courts of justice [will not] assist an illegal transaction in any respect. To sustain the present action would be in some degree ratifying, countenancing and sanctioning an illegal contract.”) (emphasis in the original); *Mitchell v. Smith*, 1 Binn. 110, 119 (Pa. 1804) (“Courts of justice sit to carry into execution the general will of the community. It would seem solecism in jurisprudence that a contract which defeat[s] the provisions of an act of the legislature should receive judicial sanction and support.”).

However, before discussing the general question presented above, there are some more compelling, preliminary questions that we must consider before starting that discussion. First, during the transatlantic slave trade, did British and American citizens have a constitutional right to stand on the corner of, say, Lombard Street or Wall Street and conspire to traffic in slaves? Could they have formed contracts to kidnap, terrorize, enslave and murder, if necessary, free persons in order to achieve financial success? Now, if your answer to each question is yes, were those contracts to enslave and terrorize legally binding and enforceable under British and American common law? Were they legally sound and enforceable before and after the enactment of the respective anti-slave trade statutes in England and in the United States?

In addition, were such contracts void from their inception in both countries because they were highly immoral and unconscionable? Were they a violation of public policy in Britain and in America? This part answers these latter questions first. Then it presents a discussion of, arguably, unethical British and American judges who aided and abetted the horrors of the slave trade. Necessarily, this part explores and critiques courts' highly unapologetic and unprincipled declaratory and equitable rulings as well as the types of contractual remedies that they awarded to slavers and to slavers' secondary supporters merchant-underwriters and large insurance companies.

A. *The Illegality and Immorality of Slavery and Slave Traders' Terroristic Conduct in Britain and America— Before the Enactment of Anti-Slave Trade Acts*

At the dawn of the slave trade, what did settled English law say about British subjects' kidnapping, terrorizing, intimidating, enslaving and forcing free persons to work for the benefit of another without pay? In 1567, the utterly reviled and oppressive Star Chamber Court decided the *Matter of Cartwright*<sup>451</sup> and declared: "Cartwright brought a slave from Russia, . . . for which he was questioned; and it was resolved that England was too pure an air for slaves to breathe in."<sup>452</sup> One hundred and thirty-five years after *Cartwright*, the influential Court of the King's Bench decided *Smith v. Brown*.<sup>453</sup> Writing for the majority, Chief Justice Holt reached

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451. See JOHN RUSHWORTH, HISTORICAL COLLECTIONS, at 468 (1680), cited in JOHN C. HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 179 (photo. reprint 1968) (1858 and ROBIN BLACKBURN, THE OVERTHROW OF COLONIAL SLAVERY, 1776-1848, at 41 n.9 (1988).

452. See also WILLIAM GOODELL, SLAVERY AND ANTI-SLAVERY, at 50 (N.Y.: William Harned, 1852) (reporting that *Cartwright* was decided in 1569 instead of 1567).

453. *Smith v. Browne*, 90 Eng. Rep. 1172, 1173 (1702).

the same conclusion and declared "one may be a villein in England, but not a slave."<sup>454</sup>

But did Justice Holt and the hopelessly unethical, biased, and politically corrupted judges<sup>455</sup> sitting on the Star Chamber Court get it right? Was slavery unconstitutional within the borders of England? Here is the short answer: it depends on whether the captives were innocents or enemies of war. Without question, Parliament, Lords of Appeal,<sup>456</sup> and common-law judges in England have an exceptionally long history of approving and enforcing public and private enslavement of war captives. In fact, centuries before the reign of Queen Elizabeth I, it was morally defensible, quite legal, and extremely common to suppress, torture, harass, and enslave captives of war. Bracton reports that English law legitimized this type of *de jure* slavery long before the eleventh century. He writes: "[e]very man is either in his own *potestas* (authority or power) or another's . . . for the law says one captured by the enemy is a slave."<sup>457</sup>

There is more: ancient English rules also state: 1) "there are things that belong to individuals. . . as the lands and the slaves of the citizens"<sup>458</sup> and 2) "other things . . . belong to the *universitas*. . . as the lands and the slaves of a city, which belong to all the citizens in such a way that they belong to none individually."<sup>459</sup> Of course, *de jure* slavery and all of its terror can occur by the operation of law where free persons are the captives. But Parliament neither authorized nor formally sanctioned the suppression, humiliation, terrorization, and enslavement of innocent persons. Why? Again, according to both dishonored and ethical English judges, such be-

454. *Id.*

455. See *supra* note 393 and the accompanying text.

456. Briefly put, the Parliament of Great Britain is a three-pronged governing or "legislative" body: The Monarch (Crown), House of Commons and House of Lords. In everyday usage, however, "parliament" refers to the House of Commons. Within the House of Lords, there are two broad groups of lords — lay lords and law lords. The former are essentially unelected politicians who sit in the House of Lords by right of birth or by title. The law lords or the Lords of Appeal — their official title — are the "educated" supreme judges of England. Unlike the U.S. Supreme Court justices, the law lords do not have a separate structure to hear and decide legal cases. They sit within the House of Lords. On the other hand, like the U.S. Supreme Court justices, the Lords of Appeal are — in theory — independent of the lay lords' influence. But a long historical record shows otherwise. Actually, for the greater part of the slave-trade years, the law lords were certainly not "independent," which could partially explain why they consistently ignored settled principles of law when deciding cases involving insurance contracts and the slave trade.

457. HENRICUS DE BRACONA, 2 BRACON ON THE LAWS, 34 (Samuel E. Thorne trans.), at <http://hlsl.law.harvard.edu/bracton/unframed/English/v2/34.htm> (last visited Feb. 27, 2004).

458. *Id.* at 40.

459. *Id.*

havior violated the constitution.<sup>460</sup> Or put differently, the air in the British Isles was just too pristine for Englishmen to terrorize, murder, and enslave *any free peoples for a profit*. Without doubt, it was settled law in England from the beginning to end of the transatlantic slave trade. What's the evidence?

First, ancient English judges enthusiastically embraced and defended the principle of natural rights and delivered this edict:

Things are said to be [no one's property] in several different ways: by nature or [natural law], as wild beasts, birds and fish [and] by the common opinion of mankind. . . . There are things that are *res nullius* by nature which nature does not permit to be anyone's property [such] as free men. Free men are not subjects of ownership and commerce and the same may be said of a sick slave.<sup>461</sup> . . . The law declares him to be free.<sup>462</sup>

Second, more modern English judges also adopted the principle that persons have a natural right to be free. Third, in every century in which the transatlantic slave trade flourished — from the mid-sixteenth century to the latter part of the nineteenth century — English judges issued an opinion proclaiming that *de jure* slavery was unconstitutional.<sup>463</sup>

460. See *Forbes v. Cochrane*, 107 Eng. Rep. 450, 458-459 (1824). Justice Best commenting that, There is no statute recognizing slavery which operates in the part of the British Empire in which we are now called upon to administer justice. It is a relation, which has always in British Courts been held inconsistent with the constitution of the country. . . . [While] economists and politicians were recommending to the Legislature the protection of this traffic, and senators were framing statutes for its promotion, and declaring it a benefit to the country, the Judges of the land, above the age in which they lived, standing upon the high ground of natural right. . . declared that slavery was inconsistent with the genius of the English constitution, and that human beings could not be the subject matter of property. *Id.*

461. Here, the ancient judge had to be referring to a slave captured in war; otherwise, the sentence or the rule doesn't make sense. Therefore, according to natural law, once a man secures his freedom, he could never become a slave, that is, unless he is a war captive. See also, *Butts v. Penny*, 83 Eng. Rep. 518 (1677) (concluding that "no property could be in villains but by compact [a formal agreement] or [by] conquest [captivity in war].").

462. BRACCONA, *supra* note 457, at 41.

463. The following cases lend some general support for the view asserted: The MID-SIXTEENTH CENTURY — In *re Cartwright*, 11 Elizabeth, 2 Rushworth's Coll. 468 (1569) (again holding that "England was too pure air for slaves to breathe in"); the SEVENTEENTH CENTURY — *Chamberlaine v. Harvey*, 87 Eng. Rep. 598, 600 (1696)

[I]f the plaintiff [has] any property in this Negro, he must either have an absolute or a qualified property in him at the time of the trespass supposed to be committed. He could not have an absolute or general property, because by Magna Charta, and the laws of England, no man can have such a property over another. *Id.*;

the EIGHTEENTH CENTURY — *Smith v. Gould*, 92 Eng. Rep. 338 (1706) ("There is no such thing as a slave by the law of England."); and the EARLY-NINETEENTH CENTURY — *Forbes v. Cochrane*, 107 Eng. Rep. 450, 452 (1824) ("[T]he [j]udges of the land, above the age in



Then again, however, any astute legal historian would quickly point out: along with the inhumanity and cruelty that it produced, the horrors and terrors of the slave trade were very prevalent in the British colonies, including the American colonies. Furthermore, the keen observer would also mention that the English government informally supported that system of terror and involuntary servitude. For certain, those observations cannot be easily overlooked. To repeat, the Houses of Lords and Commons acknowledged and approved *private, de facto* slavery on the streets of London<sup>464</sup> and they also supported *de jure* slavery in the colonies.<sup>465</sup> Arguably, by any objective measure, this latter system of suppression, intimidation and rule by fear was nothing less than an earlier form of state-supported or state-sponsored terrorism.<sup>466</sup>

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which they lived. . . declared that slavery was inconsistent with the genius of the English constitution, and that human beings could not be the subject matter of property.”).

464. Of course, there is little doubt about what occurred in the streets of London. See, e.g., *The Slave Grace*, 166 Eng. Rep. 179, 182-183 (1827). “The personal traffic in slaves. . . in England had been as public and as authorized in London as in any of [the] West India Islands. They were sold on the Exchange and other places. . . in London without impeachment from a very early period up to nearly the end of the [eighteenth] century.” *Id.* Although some would stress that very few slaves touched the earth in Bristol, England during the zenith of the slave trade, they were there nevertheless. See *A Bristol Hero*, *supra* note 219, at A30 (stating that, “The economic legacy to Bristol is enormous,” Courtier said. Very few slaves were ever brought to Bristol, whose 9,000 or so black residents today are descended from later immigrants, he said.”).

465. To illustrate, even after England had formally declared the slave trade illegal, the Court of King’s Bench decided *Forbes*, 107 Eng. Rep. at 450. In that opinion, Justice Best wrote:

I beg [that what I say does not trench] upon the local rights of the proprietors in our West India Islands [regarding] their slaves. . . . They have acquired those rights under the encouragement of the Legislature of this country, and they [should not be] put in jeopardy by any power in this country. . . . We have unfortunately recognised the existence of slavery there, although we have never recognized [state-initiated *de jure* slavery] in our own country. *Id.* at 465-8.

466. The British government — to a greater extent, the Monarch — monopolized the African slave trade from the mid-sixteenth until the very late seventeen century. Then, in 1697, Parliament enacted legislation that terminated Britain’s monopoly, formally sanctioned and encouraged *de facto* slavery in England, and fostered *de jure* slavery and unspeakable terror indirectly in distant colonies. The title of the statute was, “An Act to Settle the Trade to Africa”, 8-10 Will. III, c. 26 (1697), which gave the Royal African Company and the king’s subjects the only authority to participate in the slave trade and its terrible abuses and subjugation. Fifty-two years later, however, Parliament enacted a second anti-monopoly statute in 1749 entitled, “Act for Extending and Improving the Trade to Africa,” 23 Geo. II, c. 31 (1749-50). This latter act extended the right to trade, torture and commit horrors off the coast of Africa to all private persons and entities throughout Great Britain. The preamble to the 1749 anti-monopoly statute reads in relevant part:

Whereas as trade to and from Africa, is very advantageous to Great Britain, and is necessary for the supplying the plantations and colonies thereunto belonging, with a sufficient

But it is important to stress: parliament never enacted any positive laws that formally legitimized the terrorization, intimidation, and forced removal of a free people — from one continent to another — in the name of private commerce or free trade. However, English and American judges certainly recognized, permitted, and supported the terrorization of innocent Africans under the guise of protecting one's right to form contracts and engage in commerce. Even more remarkable, those learned jurists endorsed the systematic deprivation of human rights in the name of commerce, while simultaneously declaring that commercial terrorism was unconstitutional, and stressing that "[t]here are natural rights against which there cannot . . . be a prescription."<sup>467</sup>

A glaring example of such uninhibited judicial hypocrisy occurred in 1716, during the very height of the slave trade. While state-supported terror was raging on slave ships and on distant plantations, an English judge declared the following in *Fazakerley v Wiltshire*:<sup>468</sup> "A man cannot. . . have a more natural right to anything than to the free use of his bodily labour; and, therefore a . . . law that. . . restrain[s] a man from the use of that [labour]. . . must be naught[,] especially when no recompence is given in lieu of it."<sup>469</sup> Was the judge thinking about the innocents on those ships and plantations when he made that declaration? It is very unlikely.

American courts also embraced the rule appearing in *Fazakerley*. In 1799, the Maryland Supreme Court decided *Mahoney v. Ashton*.<sup>470</sup> Writing for the court, Chief Justice Chase declared: "slavery is incompatible with every principle of religion and morality. It is unnatural and contrary to the maxims of political law, more especially in this country. . . . [And

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number of Negroes at reasonable rates, and for that purpose the said trade ought to be open and free to all his Majesty's subjects. Therefore, be it enacted . . . . *Id.*

467. See *Corporation of Kingston Upon Hull v. Horner*, 98 Eng. Rep. 807, 811 (1774). "There are many instances, in which the power of the Crown is now understood restrained, in which it before was not so understood. There were. . . prescriptions contrary to the natural and civil rights of subjects, and detrimental to trade. These are not maintainable now, nor were three hundred years ago: there must be a strict prescription to support them. *Id.* See also, *Money v. Leach*, 97 Eng. Rep. 1075, 1086 (1765). "To search a man's private papers *ad libitum*, and even without accusation, is an infringement of the natural rights of mankind." *Id.*; *Offord v. Davies*, 142 Eng. Rep. 1336, 1338 (1862).

In *Story on Agency*, the learned author stated that, 'in general, the principal has a right to determine or revoke the authority given to his agent, at his [o]wn [m]ere pleasure[.]' The same principle has infused itself into the jurisprudence of modern Europe, as, indeed, it could not fail to do, since it is but an application of a maxim founded upon the natural rights of men in all ages, in regard to their own private concerns, when the law has not interfered to prohibit the exercise of them. *Id.*

468. *Fazakerley v Wiltshire*, 88 Eng. Rep. 754 (1716)

469. *Id.* at 755.

470. *Mahoney v. Ashton*, 4 H & McH. 295, available at, 1799 WL 397 (Md. Gen 1799).

by] the common law of England no person can have a property [interest] in another as a slave; and, slavery can only be established by municipal regulations. . . . The trade from Africa to America was. . . . contrary to the policy of the common law and of England [.]”<sup>471</sup>

Yet, even after declaring that private citizens cannot capture, terrorize, humiliate, and enslave innocents, English and American courts still helped slave traders, ship owners, merchant-underwriters, and insurance companies to accomplish those very ends. To underscore the seriousness of this charge, consider Justice Comyn’s incisive remarks in *Forbes v. Cochrane*<sup>472</sup>. He reminded his brethren on the Court of King’s Bench that England’s common law judges and Lords of Appeals had always recognized and supported slavers’ natural right to go to distant shores in order to terrorize and enslave free peoples.<sup>473</sup> Moreover, English judges endorsed such inhumanity and misery over three centuries, even though such conduct was unconstitutional, illegal, immoral, and a violation Great Britain’s public policy. To be sure, American judges behaved similarly.<sup>474</sup>

#### B. *British Courts’ Declaratory and Equitable Decisions Before the Enactment of the Anti-Slave Trade Act of 1807*

In an earlier section, a brief discussion of the controversy surrounding the *Baby M.* case appeared. Again, jurists, commentators and others severely criticized the New Jersey Supreme Court for several reasons: 1) the court opened its doors to a litigant who violated a criminal statute and came to court with “unclean hands;”<sup>475</sup> 2) the court enforced an illegal surrogacy contract; and 3) the learned judges decided against the biological mother and awarded both legal and physical custody of Baby M. ar-

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471. *Id.* at \*2-3.

472. *Forbes v. Cochrane*, 107 Eng. Rep. 450 (1824).

473. *Id.* at 453 (noting that although, by the 47 Geo. 3, c. 36, the traffic in slaves has been declared unlawful in a British subject, the Courts of England have respected the trade itself when carried on by the subjects of a State which continues to tolerate it. “[In] this country slavery does not exist; but an action is maintainable for the price of slaves in the Courts of this country.”).

474. GEORGE MELLEN, UNCONSTITUTIONALITY OF SLAVERY 28, 34 (Boston: Saxton & Pierce 1841); JOEL TIFFANY, UNCONSTITUTIONALITY OF AMERICAN SLAVERY, 27-32 (Cleveland, Ohio: J. Calyer, 1849). *See also*, EVIDENCE THAT PRE-CIVIL WAR U.S. SLAVERY AS ILLEGAL AND UNCONSTITUTIONAL: EVIDENCE FROM THE ENGLISH COMMON LAW, COURT PRECEDENTS, THE DECLARATION OF INDEPENDENCE, THE U.S. CONSTITUTION, THE BILL OF RIGHTS, AND THE MANY ANTI-KIDNAPPING PRECEDENTS, 4-5 at <http://medicolegal.tripod.com/slaveryillegal.html> (last visited June 22, 2002).

475. To read a more thorough discussion of the application of the equitable defense of “unclean hand” or the defense of *in pari delicto* as they relate to insurance contracts and controversies, see Rice, *supra* note 75, at 1166-1167 nn. 187-8.

guably to a criminal who initiated the crime, and who occupied the superior bargaining position under the contract.

Perhaps, of the three, the first one generated the most outrage and virulent commentary. By now, the reason should be fairly obvious: "a party alleging his own turpitude shall not be heard in a court of justice to sustain an action founded upon it; and, where the parties stand *in pari delicto*, the law leaves them as it finds them to reap the fruits of their dishonesty, *as well as they may*."<sup>476</sup> Unfortunately, like the Supreme Court of New Jersey, many English and American judges did not leave the blemished litigants — unlawful slave traders and insurers — where they found them, immersed in criminality, illegality, immorality, and, above all, terrorism. Instead, judges assisted them, by giving the terrorists and the tainted underwriters access to courts. Judges also awarded declaratory and equitable relief to the terrorists or to their aiders and abettors under illegal insurance contracts. What is the evidence?

First, over the centuries, British courts decided several celebrated insurance cases in which insured slave traders or their agents murdered hundreds of slaves during voyages and insurrections on ships and on land. Still, other insurance cases involved the death of slaves from the horrors of slaving and from slave traders' and ship owners' gross negligence. However, barring a few trial-by-jury cases, insured traders invariably asked courts to declare that the underwriters had a duty to pay or indemnify under the insurance contract.

For example, in 1783, the Court of the King's Bench decided the infamous case, *Gregson v. Gilbert*.<sup>477</sup> In that case, commercial terrorists kidnapped, branded, and forced 417 people to board the slave ship *Zong*. Nearing the end of a long voyage, the captain discovered that fresh water was very scarce. To complicate matters, disease broke out. Then, the captain remembered that the voyage was insured; but he knew the underwriters would not pay for sick slaves or for innocents who died from a disease. On the other hand, the captain remembered that death by drowning was a covered peril under the insurance agreement. Concluding that the sick slaves were going to die anyway and wanting to reduce the owner's financial losses, the captain decided to throw unhealthy slaves overboard. By the time the *Zong* reached its destination in the Caribbean, 132 persons had been murdered.<sup>478</sup>

476. See *Fales v. Mayberry*, 8 F. Cas. 970, 971 (D. R.I. 1815) (emphasis added).

477. *Gregson v. Gilbert*, 99 Eng. Rep. 629 (1783).

478. See generally, *Id.* at 629-630. See also FRED D'AGULAR, *FEEDING THE GHOST* (1999). This is an excellent novel that is based on the tragedy surrounding the slave ship *Zong*. Remarkably, Chapters 9 and 10 beautifully and intelligently incorporate the actual facts of this case — using the actual names of Lord Mansfield, the attorneys, and other —

William Gregson, an attorney and the Mayor of Liverpool, was the insured-plaintiff; he also was a slave trader and the owner of the murdered slaves.<sup>479</sup> He asked the insurers to pay. Astonishingly and for reasons unknown, the attorney-terrorist argued that economic necessity — rather than drowning — was the proximate cause of the murders. The underwriters disagreed. And they asserted that even if economic necessity were the cause of the financial losses, it was not a peril insured against under the contract.<sup>480</sup> Therefore, they refused to indemnify Gregson. The majority of the King's Bench Court accepted the underwriters' argument and ruled in their favor. Chief Justice Lord William Murray Mansfield declared: there was "no necessity" stemming from an inadequate supply of fresh water, because Gregson's agents threw innocent men and women overboard after a down pour of rain.<sup>481</sup>

Twelve years later, the Court of the King's Bench decided *Tatham v. Hodgson*.<sup>482</sup> In that case, the court had to decide whether insurers had a duty to compensate slave traders for the natural death of innocents. At that time, Chief Justice Lord Lloyd Kenyon<sup>483</sup> delivered the opinion. He cited Parliament's hastily enacted anti-insurance statute<sup>484</sup> in response to the *Gregson* massacre and declared: "this Act of Parliament [was] founded in humanity . . . [Therefore,] the plaintiff cannot call on the underwriters to make good this part of the loss."<sup>485</sup> Over the years, and before Parliament enacted even tougher anti-slave trade legislation, insurers prevailed in many more declaratory and equitable actions. Quite simply, underwriters embraced an unstated policy that was deceptive and contemptuous: they sold insurance to the commercial terrorists; but, after the terrorists reported losses, insurers refused to compensate traders for

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and paint an exhilarating picture of the civil trial between the slave traders and underwriters.

479. See THOMAS, *supra* note 148, at 575.

480. Gregson, 99 Eng. Rep. at 630 ("It would be dangerous to [allow] the plaintiff to recover on a peril not stated in the declaration, because it [appears that the peril was not] within the policy.") (comment of Justice Buller after embracing the underwriters' defense).

481. *Id.*

482. *Tatham v. Hodgson*, 101 Eng. Rep. 756 (1796).

483. LORD KENYON, at <http://www.genuki.org.uk/big/eng/History/Barons/barons12.html> (last visited June 24, 2002) ("Lord Kenyon. . . was appointed 6 September 1786 one of the lords commissioners of trade and plantations; and having resigned the appointment of master of the rolls, he was declared 9 June 1788 Lord Chief Justice of the court of King's Bench, and created baron Kenyon of Gredington.").

484. *Tatham*, 101 Eng. Rep. at 756 ("[T]he 34 Geo. 3, c. 80, § 10 provides 'that no loss or damage shall be recoverable on account of the mortality of slaves by natural death or ill treatment, or against loss by throwing overboard of slaves on any account whatsoever.'").

485. *Id.* at 757.

losses stemming from the murder of innocent captives,<sup>486</sup> the negligent death of slaves,<sup>487</sup> costly and fatal slave voyages,<sup>488</sup> and the loss of privilege slaves, which seamen received as compensation instead of wages for practicing their terrorism.<sup>489</sup> And underwriters adopted that position even though they contracted to cover some of those perils.

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486. *Jones v. Schmoll*, 99 Eng. Rep. 1012, 1012 (1786) (Writing for the majority of the Court of King's Bench, Chief Justice Lord Mansfield declared that "the underwriter is not answerable for [losses associated with the death of slaves] who "swallowed salt water, leaped into the sea, hung [themselves] upon the sides of ship [and] died of chagrin [after receiving wounds in a mutiny]." According to Mansfield, the loss was "a remote consequence, and not within any peril insured against by the policy."); *Farmer v. Legg*, 101 Eng. Rep. 923, 926 (1797) (Writing for the majority of the Court of King's Bench, Chief Justice Lord Kenyon declared that the insured-owner of a slave ship could not recover for losses incurred during a slave insurrection because the insured breached a condition precedent by failing to certify that the captain was certified to command the ship as required by an act of Parliament).

487. *Hodgson v. Glover*, 102 Eng. Rep. 1308, 1310 (1805) (In an *assumpsit* upon a policy of insurance and delivering the opinion for the Court of King's Bench, Chief Justice Lord Ellenborough declared that "the plaintiff [did] not shew that he has sustained a loss by the perils of the sea. He [did] not shew that if there had been no shipwreck, and the slaves had all got to a market profit would have been produced. It should have been shewn that but for the peril insured against, which happened, there would have been profit upon the adventure.").

488. *Hartley v. Buggin*, 99 Eng. Rep. 527, 528 (1781) ("This was an action on a policy of insurance upon the ship *Blossom*, at and from the coast of Africa to the West Indies, with liberty to exchange goods and slaves." Writing for the majority on the Court of King's Bench, Chief Justice Lord Mansfield upheld the jury's finding that the ship deviated from the planned voyage, an affirmative defense under the insurance policy; therefore, the insurer did not have to indemnify the slave traders and ship owner. In passing Mansfield stated what is current settled law in England and in America: "It is not material, to constitute a deviation, that the risk should be increased."); *Sellar v. M'Vicar*, 127 Eng. Rep. 365, 366 (1804) ("This was an action brought to recover the amount of the [underwriter's] subscription on a policy of insurance. The [insured] was owner of the ship *La Fraternite*, mentioned in the policy at the time of the loss and [when] she had discharged a cargo of slaves." The underwriter claimed that the insured deviated from the voyage. Both the jury and the Court of Common Pleas agreed. Justice Alvanley declared: "In this case such voyage never commenced; the case itself excludes any inception of the voyage."); *Lawrence v. Sydebotham*, 102 Eng. Rep. 1204, 1206 (1805) ("This was an action on a policy of insurance on the ship *Tamer*, with or without letters of marquee on slaves and goods as interest might appear . . . . [T]he material question was whether the policy [was] avoided by a deviation in the course of the voyage." Writing for the majority of the Court of King's Bench, Chief Justice Lord Ellenborough declared, "The slackening [of] sail for the purpose of convoying the prize was a deviation which annuls the policy.").

489. *Webster v. De Tastet*, 101 Eng. Rep. 908, 908 (1797) (The Court of the King's Bench held: "Where a mate of a ship or a sailor is to receive something at the end of the voyage in lieu of wages, e g. slaves, he cannot insure it . . . . [T]he slaves were not the subject of insurance, and that the plaintiff could not recover in this [negligence] action more than he could have recovered in an action against the underwriters."); *Robertson v. Ewer*, 99 Eng. Rep. 1011 (1786) ("[S]mallpox broke out amongst the slaves, who were all

But insurers did not always prevail. British courts certainly permitted the insured torturers and terrorists to file breach-of-contract, declaratory and equitable actions; and the insureds often received positive outcomes. Without doubt, the ruling in *Jones v. Schmoll*<sup>490</sup> presents the clearest example of how celebrated English judges, without an inkling of disquiet or remorse, encouraged slave traders to murder, intimidate and enslave blameworthy men and women. Put simply, the captain and crew on a slave ship murdered more than two hundred slaves on a voyage from Africa to the West Indies.<sup>491</sup> At the time, the blameless captives were trying to secure their freedom. The owner of the murdered slaves had secured insurance in England; therefore, he asked the underwriters to cover the losses. When the underwriters refused to indemnify, the insured filed a breach-of-contract action and asked for a trial by jury before the Court of Guildhall.<sup>492</sup>

Speaking for the entire Court of King's Bench, the renowned and learned Chief Justice Mansfield<sup>493</sup> declared: "[i]t is very clear that those, who were killed by the firing, or died in consequence of their bruises, are within the policy, [therefore, the underwriters must pay]."<sup>494</sup> But Lord

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obliged to be put on shore." Writing for the majority on the Court of the King's Bench, Chief Justice Lord Mansfield declared: "There is no authority to shew that the insured can recover for such a loss; [I]t is contrary to the constant practice. On a policy on a ship, sailors' wages or provisions are never allowed in settling the damages. The insurance is on the body of the ship, tackle, and furniture; not on the voyage or crew.").

490. *Jones v. Schmoll*, 99 Eng. Rep. 1012 (1786).

491. *Id.* at 1012.

[This] was an action on a policy of assurance '[at] and from Bristol to the coast of Africa, during her stay and trade there [and] thence to her port or ports of discharge in the *West Indies*.' The demand upon the policy was the loss of a great many slaves by mutiny. The evidence [shows that] the captain shipped 225 prime slaves [The insured slave trader] contended that they had all died in consequence of the mutiny. *Id.*

492. *Id.* at 1013 ("[A]t Guildhall, [t]he question for the jury will be, whether any of those who died by any other means, except the being fired upon, or in consequence of the wounds and bruises which they received during the struggle, are within the meaning of that policy, which insures against damage by mutiny.").

493. It must be stressed at this point that Justice Lord William Murray Mansfield was probably the most respected and preeminent judge in English history. Yet, he condoned the torture, murder and terrorization of innocent Africans. In fact, he gave slave traders and their murdering agents full access to the Court of King's Bench and presided over many of the jury trials involving commercial and insurance matter at the very height of the transatlantic slave trade. See BIRKENHEAD, *supra* note 261, at 186 (noting, "[I]t was first and foremost [Lord Mansfield's] work in developing and explaining the commercial law that has ensured him a foremost place among English judges.").

494. *Jones*, 99 Eng. Rep. at 1013 ("The first class certainly comes within the meaning of the policy, of mortality by mutiny; such as were killed in the affray. The second also comes under the same description, namely, those who died of the wounds they received from the firing and other hostilities.").

Mansfield left the other complicated insurance-related issues for the jury to decide.<sup>495</sup> The jury returned two verdicts in favor of the insured, whose agents had murdered the slaves. Amazingly, Lord Mansfield and the full Court of King's Bench upheld those verdicts and awarded compensatory damages to the insured for practicing terrorism and murdering innocent human beings in the name of commerce.<sup>496</sup>

Unquestionably, the terrorism, highly unprincipled decisions and remedies outlined in *Jones v. Schmoll* were not aberrations. Eleven years later, the Court of King's Bench, with the assistance of another jury of merchants decided *Rohl v. Parr*.<sup>497</sup> The facts in *Rohl* were extremely similar to those in *Jones v. Schmoll*: when the innocent captives on a slave ship tried to obtain their freedom, the insured's agent murdered them.<sup>498</sup> Citing the covered-perils clause in the property insurance contract, the insured asked the underwriters to pay for the loss of property.<sup>499</sup> Of course, the insurers refused, forcing the insured to sue. Simply put, the jury had to decide whether the underwriters were responsible for the total or partial loss of property.<sup>500</sup> They concluded that the underwriters had to compensate the insured terrorist for the partial loss of his human

495. *BIRKENHEAD*, *supra* note 261, at 186 ("His practice was to try such cases at the [Court of] Guildhall. The panel was chosen with great care from among the merchants of the city, to whom there was no greater source of pride than to become 'Lord Mansfield's jurymen.' [He] was accustomed to take their verdict subject to the opinion of the full Court.") (emphasis added.). See, e.g., *Tyrie v. Fletcher*, 98 Eng. Rep. 1297, 1297 (1777) ("This was an action on the case, brought by the insured in a policy of insurance, against the underwriter. The cause was tried before Lord Mansfield at Guildhall, when, by consent, a verdict was found for the plaintiff, subject to the opinion of the Court upon the question."); *Bernardi v. Motteux*, 99 Eng. Rep. 364, 364 (1781) ("[This was] an action on a policy of insurance [on] freight and goods, upon the ship . . . *Joanna* . . . The cause was tried before Lord Mansfield, at Guildhall, when a verdict was found for the plaintiff, subject, to the opinion of the Court[.]").

496. *Jones*, 99 Eng. Rep. at 1013 (The first verdict stated: "[A]ll the slaves who were killed in the mutiny, or died of their wounds, were to be paid for." And the second one read: "[A]ll those who died of their bruises, which they received in the mutiny, though accompanied with other causes, were to be paid for.").

497. *Rohl v. Parr*, 170 Eng. Rep. 414 (1796).

498. *Id.* ("The ship sailed from St. Bartholomew on the 1st of September 1792, arrived safe on the coast of Africa, and began to trade . . . [T]here was an insurrection of the slaves on board the ship. They had then forty-nine on board, and seven were killed [.]").

499. *Id.* ("[T]wo points arose in the case: whether this was a total loss arising from the perils of the sea; or, [whether it was a] partial loss above five per cent for which the plaintiff was entitled to recover.").

500. *Id.* ("The jury (which was a special one) found, that this was not a loss within the term of perils of the sea in policies of insurance and of course that the plaintiff could not recover for a total loss. Then became a question, as to the partial loss from the insurrection, which it was necessary should exceed five per cent in order to give the plaintiff a title to recover.").



cargo. Chief Justice Lord Kenyon, who succeeded Lord Mansfield in 1788, accepted the verdict and entered the judgment.<sup>501</sup>

And like his esteemed predecessor on the Court of the King's Bench, Chief Justice Lord Kenyon showed absolutely no concern about questioning the legitimacy of a property insurance contract that encouraged an insured to commit murder and one that required the underwriter to pay for the loss. Clearly, from the perspective of a reasonable person, the rulings and verdicts in *Jones* and in *Rohl* are gut wrenching and horrendous for two reasons. First, in both cases, the insurance agreements were obviously illegal from their inception. To repeat, England's constitution and common law prevented English citizens from creating contracts in which they agree to enslave innocents. Therefore, the breach-of-contract actions in *Jones* and *Rohl* should have been dismissed summarily because both the underwriters and insured were tainted with criminality.

But more important, the condition precedent clause in the respective insurance contracts required insurers to compensate the insured slave traders, if those terrorists murdered their slaves under clearly specified conditions.<sup>502</sup> Without doubt, those provisions were highly unconscionable and immoral. Accordingly, as English courts have done on other occasions, the learned justices in *Jones* and in *Rohl* should have declared that the insurance contracts were void *ab initio*. Why? The agreements encouraged slavers to murder guiltless and highly vulnerable individuals to achieve social control and, ultimately, commercial prosperity.<sup>503</sup>

501. *Id.* at 415. Specifically the jury had to address this question: "If the calculation [of damages] was taken at the time when the loss happened by the insurrection, when the slaves were killed, then above five per cent was the loss; but if at the time of the condemnation of the ship at Cape Coast, at which time the whole cargo was sold, [damages] would be under five per cent . . . . Lord Kenyon expressed his assent to the finding of the jury on both points. The plaintiff had a verdict for an average loss. *Id.*

502. *Jones v. Schmoll*, 99 Eng. Rep. 1012, 1012 (1786) ("There was a memorandum on the policy, that, 'the assurers are not to pay for mortality by mutiny, unless the same amount[ed] to 10l per cent to be computed upon the first cost of the ship, outfit and cargo, valuing Negroes so lost at 35l. per head.'"); *Rohl*, 170 Eng. Rep. at 414 ("There was a memorandum, 'to be free, from average, under ten per cent for loss in boats, and from five per cent for loss from insurrection.'").

503. See, e.g., *Amicable Society v. Bolland*, 5 Eng. Rep. 70, 75-76 (1830) The Lord Chancellor in the Court of Chancery observing:

The principles of law established in marine insurances are applicable to this case. . . . Suppose that the party insuring had agreed to pay a sum of money upon condition, that in the event of his committing a capital felony and executed for that felony, his assignees shall receive a certain sum of money [from the insurer]. [I]s it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract take away one of those restraints operating on the minds of men against the commission of crimes namely, the interest we have in the welfare and prosperity of our connexions. [T]his policy cannot be sustained, and that the Respondents are not entitled

Insured slavers also won other cases in English courts before the enactment of 1807 anti-slave trade act. For example, in 1806, the Court of Common Pleas decided *King v. Glover*.<sup>504</sup> Writing for the majority after considering the jury's verdict, Chief Justice Sir James Mansfield declared that underwriters had to pay death benefits to a captain's widow.<sup>505</sup> It was irrelevant that the captain died while participating in an illegal and immoral activity— an outlawed voyage to kidnap free persons and force them into involuntary solitude.<sup>506</sup> And on three occasions<sup>507</sup> and under the leadership of Chief Justices Lord Kenyon and Ellenborough, the Court of the King's Bench forced insurers to reimburse thieving and immoral commercial traders, following the destruction and total loss of their slaves ships and supplies.<sup>508</sup> Again, in each case, the destruction of the property occurred during illegal voyages to traffic in slaves.

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to recover. *Id.*; *Fisher v Bridges*, 118 Eng. Rep. 713, 716 (1852) ("When we see money given in consideration of an act which is and always must be illegal, for instance a murder, a contract to pay the money would be illegal.").

504. *King v. Glover*, 127 Eng. Rep. 603 (1806).

505. *Id.* at 603.

[The suit] was commenced by [the widow to recover a loss] upon a policy of insurance effected by her husband 'on his commissions, privileges, &c. as may be hereafter valued.' [She] obtained a verdict on this policy at [the Court of] Guildhall. [The insurer called] on plaintiff to show cause why that verdict should not be set aside, and a nonsuit or a new trial be had. *Id.*

506. *Id.* at 604.

[The insurer] moved on several points [:] but [there is only one] objection which is material [:] [T]he insurance [was] illegal [under] the authority of *Webster v. De Tastet*, 7 Term Rep. 157, 158, 101 Eng. Rep. 908 (1797). The policy in this case is only against the perils of the sea. If the policy were upon the health of the slaves, I think there would be considerable force in the objections last made. But this is a policy against the perils of the sea only, which is an answer to the objection. *Id.*

507. See *Shawe v. Felton*, 102 Eng. Rep. 310 (1801). This was an action on a policy of insurance on the ship *Indian*, and goods on a voyage at and from Liverpool to the coast of Africa, including provisions and sea stores laid in for the slaves. In the course of her voyage she met with a violent concussion. [S]he was kept afloat by pumping until she reached Demerara[:] a few days afterwards, she sunk[.] *Id.*

See also *Parr v. Anderson*, 102 Eng. Rep. 1264, 1264 (1805) (noting, "This was an action upon a policy of insurance on the ship *Mercury* [to] and from Liverpool to places of trade on the coast of Africa to her final port of discharge in the British West [Indies]. . . . [She] wrecked in the course of the voyage described in the policy."); *Freeland v. Glover*, 7 East 457, 457, 103 Eng. Rep. 177, 177 (1806) (stating, "This was an action on a policy of insurance on goods on board the ship *Neptune* — 'lost or not lost, at her first place of trade on the coast of Africa [and] thence to Liverpool.'").

508. *Shawe*, 102 Eng. Rep. at 311-3 ("[The insurer called] on the plaintiff to shew cause why the verdict should not be set aside on the grounds that the subject matter of the insurance was so much reduced from the original value at the time of the loss [.]" Chief Justice Lord Kenyon declared: "The jury [did not] doubt that the ship was seaworthy when she sailed, and that there was a total loss; [Since the] rule [regarding] valued policies [is settled], it is too late to open it again."); *Parr*, 102 Eng. Rep. at 1265-6.

Once more, it is important to repeat that such criminality and corruption did not impress venerated English justices enough to persuade them to dismiss traders' breach-of-contract actions summarily. Clear and convincing evidence also reveals that such illegality did not impress some pre-1807 American judges sufficiently enough to motivate them to dismiss similar actions based on unlawful slave-trade agreements. Now earlier, we learned that British underwriters insured the overwhelming majority of the slave trafficking that originated in colonial and in early-Independence America. Consequently, careful research failed to uncover any reported, pre-1807 American cases involving litigation between insurers and slave traders, *per se*. However, *Andersons & Tilley v. Moncrieff*,<sup>509</sup> is an exceptionally enlightening breach-of-contract case involving an illegal slave-trade agreement.

To help ensure large profits, the once highly successful and influential British firm of John and Alexander Anderson & Company<sup>510</sup> employed agents to kidnap, intimidate, capture and sell citizens of the African continent.<sup>511</sup> William M'Leod, a resident of Charleston, was one of those agents. Under the terms of a consignment contract, M'Leod had a contractual duty to sell the captives and send the proceeds to the Andersons. Before his death, M'Leod failed to give a full accounting of the sale.<sup>512</sup>

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The insurer refused to pay, claiming that the ship deviated from her original voyage; and the jury agreed. Writing for the court, Chief Justice Lord Ellenborough reversed and stated: "[I]t may be material to ascertain in what manner [have] parties to contracts containing this form of words have acted upon them in former instances, where deviations of the kind now in question have happened. [Therefore,] this case should undergo a second trial. *Id.*

*Freeland v. Glover*, 103 Eng. Rep., at 178-9. (The insurers asserted, "material information had been concealed from the underwriters [;]" consequently, they had not duty to reimburse the thieving terrorist. The jury at Guildhall disagreed; and, after examining and approving the verdict, Chief Justice Lord Ellenborough declared: "[T]he assured disclosed every thing which he knew as to the existing state of the ship at the time: it was a true statement of its then actual situation. There was therefore no concealment of any thing material.").

509. *Anderson & Tilley v. Moncrieff*, 3. S.C. Eq. 124, *available at*, 1810 WL 300 (S.C. 1810).

510. *See generally*, *In re William Coles*, 164 Eng. Rep. 1243, 1244 (1863); *Ryan v. Anderson*, 56 Eng. Rep. 474, 475 (1818); *Rowe v. Anderson*, 58 Eng. Rep. 100, 101-2 (1831).

511. *Anderson & Tilley*, 1810 WL 300, at \*1 ("The complainants—John & Alexander Anderson — are London [m]erchants. . . [They hired Captain Walsh, the owner of the schooner *Phoebe* to kidnap] forty-five Negroes from the Island of Bance, on the coast of Africa.").

512. *Id.* ("[Under the consignment contract,] William M'Leod [had a duty] to sell the Negroes [in] Havana to the best advantage, and then [to] remit the [net] proceeds to the Andersons. . . [M'Leod] received and sold [the [Negroes] . . . [but the Anderson were ignorant of the time and amount of the sale because they never received complete accounting the transaction] or proceeds of the sale] during William M'Leod's life time.").

The Andersons filed an equitable action against M'Leod's administrator in a South Carolina court.

From the beginning, the consignment contract was highly offensive and morally wrong because its performance contributed to the terrors and atrocities of the slave trade. But more important, the agreement violated South Carolina's<sup>513</sup> and the federal government's<sup>514</sup> first anti-slave trade statutes. Yet, the court of equity still considered the Andersons' tainted complaint and ruled in their favor. How did the court justify its decision? First, the judge acknowledged the following: 1) courts of equity should not assist any person with unclean hands,<sup>515</sup> and, 2) courts should neither enforce a corrupt agreement nor hear any action premised on an illegal contract.<sup>516</sup> However, citing agency principles,<sup>517</sup> the judge decided to resolve the controversy between the British terrorists and their American agent.

To help underscore the correctness of his ruling, the South Carolina judge cited two English cases — *Tenant v. Elliott*,<sup>518</sup> an insurance case, and *Farmers v. Russell*.<sup>519</sup> In both cases, the Court of Common Pleas used agency theory rather than contract principles to resolve conflicts, which were somewhat similar to the one appearing in *Andersons*.<sup>520</sup> The

513. *Id.* at \*2.

[A]n act of the [South Carolina] legislature [that] prohibit[ed] the importation of [N]egroes until the 1st January, 1799 [stated]: '[T]he importation of [N]egroes from Africa and other places beyond the seas, be and is hereby prohibited until the 1st of January, 1799'; and it further declared that every slave so imported should be forfeited; and in and by a certain other act of the legislature, passed 27th of December, 1798, the act of 1799 was extended to the 1st of January, 1801. *Id.*

514. *Id.* at \*4 ("[T]he Act of Congress 1794 prohibit[s] citizens and residents in America fitting out vessels, for the African trade, to supply foreign ports or places, which would affect the shipment for the Havana."

515. *Id.* at \*4-5 (The attorney for the Moncrieff asserted: "A party coming into Court, to ask equity, must come in with clean hands." But incredibly, the judge insisted: "I will not say that there may not be cases, *where the transaction may involve so much moral guilt* that courts of justice would not suffer themselves to be polluted with them directly or indirectly. *But I do not think that this is one of those cases.*") (Emphasis added).

516. *Id.* \*5 ("The position laid down by the defendant's counsel is certainly true in general, that courts of justice will not enforce illegal contracts, nor assist parties in recovering under them. The cases of insurance on illegal voyages, and other examples, have been cited and relied upon in support of this doctrine.").

517. *Id.* ("The counsel [for the defendant] insist[s] that this was a contract, whereby Mr. M'Leod undertook, by receiving the [N]egroes, to sell them and be accountable for the proceeds; and that this contract being contrary to law, was void and could not be enforced in our courts. I cannot [agree]. . . . This is a mere agency.").

518. *Tenant v. Elliot*, 126 Eng. Rep. 744 (C. P. 1797).

519. *Farmers v. Russell*, 126 Eng. Rep. 913 (C.P. 1798).

520. *Tenant*, 126 Eng. Rep. at 745 (Chief Justice Eyre stating: "The question is, Whether he who has received money [for] another's use on an illegal [insurance] contract,

South Carolina court, of course, conveniently ignored or summarily dismissed three crucial facts. First, then as now, *Tenant* and *Farmers* are extremely questionable minority decisions because the very inferior Court of Common Pleas decided both conflicts. Second, the Court of Common Pleas' application of agency principles in both cases was decidedly appropriate, because the complainants were innocent, third-party beneficiaries<sup>521</sup> under the illegal agreements. However, in *Andersons*, the plaintiff was a party to an illegal employment contract. Although courts may employ agency principles to decide a controversy between a principal and an agent, two facts remain: the foundation of that relationship is still based on an employment contract; and, if there is a breach of a contractual duty, the resulting action sounds in contract and not under a theory of agency. Also, if either party has engaged in any illegality, a court of equity should refuse to award any relief to the principal or to the agent, under the settled doctrine of "unclean hands."

Most assuredly, the outcome in *Andersons* represents a supreme example of how American courts of equity cavalierly ignored the will of both state legislators and members of Congress – as reflected in state and federal anti-terrorism statutes – and, intentionally dismissed settled principles of equity and contract law, while expediently proffering untenable ones. Finally, the South Carolina judge in *Andersons* strongly asserted: permitting M'Leod's estate to keep money that arguably belonged to the British terrorists would be "monstrous."<sup>522</sup> For sure, this writer strongly disagrees with that conclusion. The propensity for extremely unprincipled American judges to willfully enforce exceptionally corrupt slave-

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can be allowed to retain it, [given that it is not] the desire of those who paid it to him? I think he cannot."); *Farmers*, 126 Eng. Rep. at 914. Chief Justice Eyre stating:

Plaintiff's demand arises simply out of the circumstance of money being put into the Defendant's hands to be delivered to him. This creates an *indebitatus* — from which an assumpsit in law arises [;] [therefore,] *an action on the case* may be maintained. It was on this ground that the [c]ourt proceeded in *Tenant v Elliott*, and I find myself under a difficulty in making any distinction between that case and the present [case]. *Id.*

521. *Id.* at 744 ("A —[who] received money [on behalf] of B [under] an illegal contract between B and C — shall not be allowed to [use] the illegality of the contract as a defence, in an action brought by B [to collect the] money."); *Farmers*, 126 Eng. Rep. at 913 ("If A receive[s] money [from] B [for] the use of C, it may be recovered by C in an action for money [even] though the consideration on which B paid it [was] illegal.").

522. *Anderson & Tilley*, 1810 WL 300, at \*5. [The] defendant [alleges] that whatever may have been the moral obligation, the complainants were not entitled to recover from the defendant, because the money in question arose from a shipment of [N]egroes [in] 1799, from the coast of Africa, to Mr. M'Leod, in Charleston, at a time when the importation of [N]egroes, was made illegal by the acts of [the South Carolina] Assembly prohibiting such importation [*But, it*] *would be monstrous that the defendant should be permitted to keep the money.* (Emphasis added) *Id.*

trade agreements between commercial terrorists and their aiders and abettors was certainly the greater monstrosity.

C. *British and American Courts' Declaratory and Equitable Decisions After the Enactment of the Anti-Slave Trade Act of 1807*

Certainly, before Britain and America enacted their respective, comprehensive anti-slave trade legislation in 1807 and 1824, judges in both countries exhibited callous indifference to traders' commercial terrorism. More astounding, those otherwise learned justices consistently ignored settled principles of law regarding the unenforceability of illegal and immoral contracts. And courts proudly enforced illegal insurance contracts, which required insurers to reimburse slavers after the latter had terrorized enslaved and, even murdered, millions of innocent men, women and children.

One could argue, however, that the laws prohibiting such abuses and inhumanity were less than crystal clear before 1807. Therefore, fairness requires one to view English and American judges' allegedly unprincipled rulings and purported endorsement of commercial terrorism against that background. Definitely, this argument has some merit and it should be addressed. We know for sure that Parliament and state legislatures in America did not formally prescribe the terrorism, subjugation and inhumanity of the slave trade. But British and American legislative bodies certainly gave slave trafficking and its accompanying terrors more than a nod and a wink.<sup>523</sup> One could even argue that English and American courts were simply embracing the conventional wisdom or enforcing the public policy of their respective countries at the time.

Of course, after a more thorough analysis, those arguments ring hollow. We must remember that in 1807 and 1824, respectively, both Congress and Parliament totally abolished all commercial activities and insurance agreements involving the slave trade. Additionally, under both acts, the government could prosecute all violators— principals, aiders and

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523. See, e.g., *Forbes v. Cochrane*, 107 Eng. Rep. 450, 453, 458-459 (1824).

It is true, that in this country slavery does not exist; but an action is maintainable for the price of slaves in the Courts of this country . . . [W]e have unfortunately recognised the existence of slavery [in the West Indies], although we have never recognized it in our own country. Although the English law has recognised slavery, it has done so within certain limits only. . . [Even] Queen Elizabeth expressed her trope to Sir John Hawkins that the Negroes went voluntarily from Africa to submit to domestic slavery in another country [. . .] [And she] declared, that if ANY FORCE WAS USED TO ENSLAVE THEM, she [knew] it would bring down the vengeance of Heaven upon those who were GUILTY OF SUCH WICKEDNESS. It is unfortunate, however, for the memory of that Queen, that in her reign patents were granted to encourage the trade, and those were followed by Acts of Parliament expressly recognising it. (Emphasis added) *Id.*

abettors— and send them to prison for practicing terrorism. More important, to show that they were extremely serious about ending commercial terrorism, Parliament and Congress gave their respective naval forces broad enforcement powers such as: 1) the power to arrest commercial terrorists, 2) the muscle to take alleged violators before a civil court for prosecution, and 3) the authority to seize and condemn the terrorists' slave ships and property.<sup>524</sup> Therefore, in light of Congress and Parliament's unquestionable intent to stop slave traders' terroristic activities, we ask: did English and American judges assist or impede the process after 1807?

A comparison of pre- and post-1807 rulings reveals fairly similar results. After 1807, English and American justices still unashamedly allowed commercial terrorists and their corrupt abettors—especially insurance underwriters—to resolve breach-of-contract and related squabbles in courts of law and equity. Moreover, post-1807 courts also ignored settled legal and equitable principles to achieve strained and convoluted decisions. There is, however, one significant contrast between the two periods. Among the post-1807 cases, American and British courts decided the greater majority of the insurance controversies in favor of commercial terrorists.

More specifically, barring two decisions, the central question in the post-1807 cases was constant: whether insurance companies had a contractual duty to indemnify slave traffickers for losses, after American and British navies seized the terrorists' slave ships, furnishings and cargo. As reported earlier, the Supreme Court of Pennsylvania decided *Schwartz v. Insurance Company of North America (INA)*<sup>525</sup> in 1814. In that case, British authorities seized the insured's ship, which was transporting slaves and other contraband.<sup>526</sup> After the financial loss, INA refused to indemnify, arguing that Schwartz had breached an express warranty in the insurance contract.<sup>527</sup> The Pennsylvania Supreme Court agreed, adopted the jury's verdict, and declared that INA had no duty to compensate the insureds.<sup>528</sup>

524. See *supra* notes 353-359 and 366-369 and accompanying text.

525. *Schwartz v. Ins. Co. of N. Am.*, 6 Binn. 378 (Pa. 1814).

526. *Id.* at 380 (“[B]oth ship and cargo were condemned . . . [because] the voyage was an adventure commencing in contraband.”)

527. *Id.* at 381 (“[T]he Chief Justice explicitly charged the jury that the warranty of American property had been violated[;] . . . therefore [the insureds] were not entitled to recover.”)

528. *Id.* at 383 (Writing for the court, Chief Justice Tilghman stated: “The cause was tried before me, and the jury agreeably to my charge gave a verdict for the [insurance company].”).

A year earlier, Lord Chancellor Eldon — the father of equity law, who presided over the Court of Chancery in England — reached a similar conclusion in *Tennant v. Henderson*.<sup>529</sup> In that case, the slavers represented on the application for insurance that they were not murderous and thieving traffickers.<sup>530</sup> During the voyage, a French privateer, rather than the Royal Navy, seized the slavers' ship.<sup>531</sup> After the slavers reported the seizure and economic losses, their Scottish underwriters discovered that the insureds had lied and concealed material information on the application, and therefore, the underwriters refused to compensate the terrorists. In the court of equity, the underwriters defended their decision by asserting that the contract was void from its inception in light of the criminals' material misrepresentation and concealment.<sup>532</sup>

That the underwriters employed those affirmative defenses is not extraordinary; insurers often raise them in various breach-of-contract actions. But the *Tennant* insurers advanced another creative and arguably cynical defense. The parties consummated the insurance agreement in 1803.<sup>533</sup> From the perspective of some legal scholars that was a period during the slave trade when insurance contracts were arguably legal because English statutes did not clearly proscribe them. But note: the underwriters certainly did not defend themselves by asserting that the insurance contract was legal. Instead, the insurers stressed that the proposed voyage and slave ships were illegal from the very beginning, thus making the insurance contract illegal from its inception.

More telling, the deceptive and criminally inclined underwriters still agreed to insure the terrorists' property.<sup>534</sup> And even more enlightening,

529. *Tennant v. Henderson*, 3 Eng. Rep. 716 (1813).

530. *Id.*

The original order of the insurance was as follows: 'Please effect £2000 upon 5/6ths of the ship at and from Liverpool to the coast of Africa and the African islands, during her stay and trade there, and from thence back to Liverpool, with liberty to exchange goods with other ships, at £6 per cent . . . [W]e purchase no slaves, nor does the ship go to the West Indies.' *Id.*

531. *Id.* at 717.

532. *Id.* ("[The] mutual or combined trading was not communicated to the underwriters, and the concealment, it was contended, was of a material fact. The underwriters in Scotland refused to settle the loss. [T]hey insisted that the ship did traffic in slaves.").

533. *Id.* at 716.

Upon the faith of this representation, insurance to the extent of £2000 was [purchased] on the 21st of January, 1803 [and] effected on the ship *Imperial*. The next insurance made was upon the cargo [and] dated 18th June 1803. A third policy, also on the cargo, was effected [on] 1st November, 1803, 'At and from Africa and the African islands to Liverpool.' *Id.*

534. *Id.* at 718 ("[T]he underwriters rested their case in both appeals [upon this defense]: It was represented that the *Imperial* did not traffic in slaves; [but] she did actually deal in slaves, without being regularly entered as a slave ship. [Therefore], the voyage was illegal.").



the underwriters' unabashed admission of illegality did not impress Lord Chancellor Eldon one iota. The celebrated justice simply ignored the insurers' illegality, highlighted the slavers' misrepresentation, and ruled in favor of the immoral underwriters.<sup>535</sup> Lord Eldon should have dismissed the action altogether under settled principles of equity. After all, centuries later, the legal community would praise him and give him most of the credit for developing hallowed principles of equity.<sup>536</sup>

It is important to repeat, however, that *Schwartz* and *Tennant* are minority decisions. After 1807, the overwhelming majority of American<sup>537</sup> and British<sup>538</sup> judges forced insurance companies to reimburse commer-

535. *Id.* at 719 (holding that "the decision of the court below, in favour of the underwriters, was affirmed.").

536. *BIRKENHEAD*, *supra* note 261, at 224. To Eldon's Chancellorship is usually assigned the completion of equity. The Chancellor sought to do right by the petitioner without regard to what he might have done in similar cases in the past or might do in the future. But no [c]ourt can exist long without establishing a practice or habit for similar cases. It was inevitable that some Chancellor would complete the work, and it so happened that Eldon was called upon to do it. *Id.*

537. *Henry Messonier v. Union Ins. Co.*, 10 S.C.L. 155 (1 Nott & McC. 155), *available at*, 1818 WL 847, at \*3, 9 (1818) ("The British government had no right to capture a Spanish vessel engaged in the slave trade. The majority of the [c]ourt [feels] that the plaintiff is entitled to recovery for a partial loss [under the insurance contract]"); *David Bailey v. The South Carolina Ins. Co.*, 6 S.C.L. 381 (1 Tread. 381), *available at*, 1813 WL 339, at \*17-18 (S.C. Const. App. 1813). Justice Brevard wrote: I now proceed to give my opinion in the case of the schooner and in the case of the fifty-two Negroes in which [a] verdict was for the plaintiff. The contract of insurance is a contract of indemnity for all losses within the policy. Damage by capture and detention, and damage by the perils of the sea, were insured against. The detention [by His Britannic Majesty's schooner] was illegal, and the assured are entitled for all losses thereby sustained. *Id.*

*See also* *Lockhart v. The Merchant Ins. Co. of New Orleans*, 10 Rob. 339, *available at*, 1845 WL 1472, at \*1-2, 8 (La. 1845) ("This was an action to recover \$10,000, the insurance upon fifteen slaves. There was a verdict and judgment for the plaintiff. . . . [T]he evidence [does not show] a deviation in the usual voyage from Richmond, as to authorize our interfering with the verdict of the jury."). *But see* *Jeremiah Murden v. S.C. Ins. Co.*, 8 S.C.L. 200, *available at*, 1817 WL 612, at \*1, 4-5 (S.C. Const. App. 1845).

[T]he owners of brig [had] eighty-three slaves, beside three privilege slaves. . . . The vessel had been detained on the coast of Africa before the prohibitory [slave trade] act of Congress took effect. . . . [The] vessel was unfortunately lost; and this is an attempt to visit the misfortune on the underwriter. . . . But the misdirection of the presiding judge, on the question of deviation, furnishes an irresistible ground for a new trial. *Id.*

538. *Brown v. Smith*, 3 Eng. Rep. 725, 726-28 (1813).

This was a question of insurance on the ship and cargo of *The Friendship*, employed in a voyage to Africa in the slave-trade. . . . [I]n Barbados she was boarded and taken possession of by a ship of war. The Government Agent at Barbados took charge of the ship and, [disposed] the whole of the cargo and stores." The ship was sold accordingly. Lord Chancellor Eldon, sitting on the Court of Chancery held: "Under the particular circumstances of this case, the Assureds were entitled to abandon [the ship altogether and collect the insurance proceeds. *Id.* *Heath v. Durant*, 152 Eng. Rep. 1268, 1269-70 (1844) ("[T]he defen-

cial terrorists, following the British and United States governments' seizure and condemnation of slave traders' ships, instruments and cargo. Furthermore, like their pre-1807 brethren, the post-1807 judges intentionally ignored settled legal and equitable principles to achieve highly amoral decisions. Most assuredly, the post-1807 justices' seizure rulings were much more destructive and indefensible because they significantly undermined both Congress' and Parliament's determined efforts to stop traders from trafficking slaves and practicing commercial terrorism.

## VII. CONCLUSION

Immediately after the September 11th attacks on the World Trade Center and Pentagon, President Bush and Attorney General Ashcroft proclaimed passionately, incessantly, and loudly that federal agents and military forces would travel the globe searching for and punishing terrorists and their aiders and abettors. When President Bush and members of his administration made those announcements, they did not clearly define terrorism and they failed to identify the salient attributes of "true" terrorists. Nevertheless, careful analyses of subsequent speeches strongly suggest that federal officials have unwisely adopted an extremely narrow definition of terrorism. More significant, it appears that the administration has decided to target and arrest only a few contenders and prosecute them and their aiders and abettors for practicing terrorism.

This is a disturbing and shortsighted development. The administration should expand the definition of terrorism and enlarge the focus of concern to include "domestic terrorism" — domestic violence, spousal abuse and other concerted terrorist activities, which are based on one's ethnicity, gender or religious affiliation. Additionally, the pool of persons who qualify as aiders and abettors of terror should be larger, too. Early on, this article documented conclusively that terrorism appears in many forms. And although elected officials have the luxury of embracing

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dant and the plaintiffs [agreed] that the policy and the risks insured against, should not include capture, except in case of war. This vessel was in fact taken by the authority of the Portuguese government [rather than the British authorities], in time of peace, on the alleged ground of her being concerned in the slave-trade." Viewing the case more favorably from the slave traders' perspective, Chief Baron Lord Abinger, sitting on the Court of Exchequer declared: "It will be a question for the jury whether the memorandum formed part of the original contract or not."); *Lozano v. Janson*, 121 Eng. Rep. 61, 67-68 (1859). In June, 1854, the *Newport* was seized, near Ambriz, by a Queen's ship, under STAT. 5 G. 4, c. 113, s. 4, for being illegally engaged in the slave trade." However, writing for the Court of Queen's Bench, Chief Justice Lord Campbell disagreed and held: "If this had been a lawful taking at sea by a British cruiser, the underwriters would not have been liable but it must now be definitively considered to have been a wrongful taking. The wrongful taking of this ship cannot be regarded as an act ordered or sanctioned by the English Government. Judgment [is] for [the insureds]. *Id.*

tapered definitions and descriptions to satisfy certain political realities and constraints, the legal community would do itself and the community at large a grave disservice by painting terrorism as well as the aiders and abettors of terrors so narrowly.

The reason for raising this concern is not very complex. It is indisputable that international terrorism is a clear and present danger; there are disgruntled groups beyond the United States' borders who want to terrorize and destroy Americans for economic and political reasons. But, if current projections are correct, homegrown terrorists will injure, murder and terrorize just as many or more American citizens in the immediate-to-distant future than the entirety of international, state-sponsored and state-supported terrorists.<sup>539</sup> Much more disquieting, domestic malcontents within families will continue to injure and terrorize an even greater number of parents, children and spouses — especially women— if the estimates are sound.<sup>540</sup>

Once more, the Bush Administration declared that the government would pursue and punish aiders and abettors of terror and violence. Does the President include certain national and international liability insurance companies in the pool of aiders and abettors of terrorism? Since the September 11th attacks, an increasing number of Americans have purchased or tried to purchase liability insurance to cover personal, property and business losses in the event they become victims of domestic or

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539. See, e.g., Sandra Murillo, *Los Angeles Jewish Group and Police Team Up Against Hate*, L.A. TIMES, Feb. 14, 2002, at B4 ("LAPD Chief Bernard C. Parks said, 'We've put a lot of energy since Sept. 11 looking at terrorists in other countries, but you can never forget the terrorists that are home-grown.'"); Tom Baxter, *On Politics: Terror Risks Are A Lot Closer Than Kabul*, ATLANTA J. CONST., Dec. 4, 2001, at A9 (stating, "What may have been the most successful anti-terrorist operation since 9/11 was carried out last week. . . . [at the] New Bedford [high school]. . . . [T]here were 3,300 students in that school, roughly the same number currently listed as dead at the WTC. . . . 'We have met the enemy,' wise little Pogo said, 'and he is us.' And the terrorist? Why, that must be the kid next door."); Margaret Talev, *Ventura County Panel Tells of Countywide Anti-Terrorism Steps*, L.A. TIMES, Nov. 22, 2001, at B3 (reporting that, "Law enforcement intelligence suggests the county could be at least as vulnerable to home-grown terrorists as those connected to the Sept. 11 attacks. 'The terrorists you'd have anyway may be emboldened, Sheriff Bob Brooks said 'You can't just look at Middle Eastern terrorism.'"); and Howard Kurtz, *Powell Urges Calm in Face of New Threats*, WASH. POST, Oct. 22, 2001, at A4 ("Secretary of State Colin L. Powell said that Americans should 'not become chickens' in the face of terrorist threats as he warned of [terror from] 'home-grown terrorists.'").

540. Cf. *Insights On Family Violence*, MIAMI HERALD, Sept. 18, 2001, at B6. The massive violence caused by suicide hijackers [on September 11th] is gripping and still incomprehensible. Yet for most Americans the risk of harm from a terrorist is remote compared to the wrath of a neighbor or the jealous rage of a spouse. Domestic violence is an insidious threat to society . . . . [M]any victims would call domestic [violence a] form of terrorism. *Id.*

international terrorism. But, as the historical evidence in this article reveals, insurance companies have a very long history of aiding and abetting terrorism, especially commercial terrorism. More recent evidence also demonstrates that insurers aid and abet—intentionally or negligently—murderers,<sup>541</sup> employers who victimize employees,<sup>542</sup> husbands and mates who terrorize women,<sup>543</sup> and persons who engage in malicious conduct.<sup>544</sup>

Since September 11th, many underwriters have refused to sell property and casualty insurance to “high-risk” individuals and businesses, those that have been terrorized or have a greater likelihood of becoming victims of terrorism.<sup>545</sup> Yet, as of this writing, the Bush Administration wants to transfer the heavy burden of insuring high-risk persons and busi-

541. Cf. *Michael v. Michael*, No. L-99-1397, 2000 WL 1005209, \*4 (Ohio Ct. App. July 21, 2000) (asserting “that State Farm was negligent [for] issuing a life insurance policy [to his wife] that was an incentive/motive for murder.”); *Schoeman v. New York Life Ins. Co.*, 726 P.2d 1, 3 (Wash. 1986) (barring a wrongful death action that asserted “that the Insurer acted negligently in reinstating [a life insurance] policy because it knew or should have known that [the owner of the policy] had no insurable interest in the life of [the murdered insured] based on *res judicata*.”); *Williams v. John Hancock Mut. Life Ins. Co.*, 718 S.W.2d 611, 611 (Mo. App. Ct. 1986) (the court’s refusing “to hold that an insurance company has no liability if it negligently issues an insurance policy which acts as an incentive for a murder or attempted murder.”); and *Lopez v. Life Ins. Co. of Am.*, 406 So. 2d 1155, 1159 (Fla. App. Ct. 1981) (embracing the view “that an insurer has a duty to use reasonable care not to issue a policy of life insurance in favor of a beneficiary who has obtained such policy without the knowledge or consent of the insured [and with the intent to murder.]”).

542. See, e.g., *Gardenhire v. N.J. Mfrs. Ins. Co.*, 754 A.2d 1244, 1248 (N.J. Super. 2000) (finding that the insurance company “may be potentially liable” under New Jersey’s Law Against Discrimination for aiding and abetting the employers’ discriminatory conduct and harassment). See also *Colorado Civil Rights Com’n v. Travelers Ins. Co.*, 759 P.2d 1358, 1366-1367 (Colo. 1988) (holding that Travelers was liable under Colorado’s civil-rights statute for aiding and abetting the employer’s discriminatory practices, by issuing a policy that lacked sufficient coverage for normal pregnancy expenses.).

543. See, e.g., Editorial, *Stop Bias Against Battered Women 2000 Georgia Legislature*, *supra* note 68, at A22 (stating “[t]he horror stories abound — from women denied renewal of homeowners’ policies because an abusive ex-spouse had previously kicked down the front door to women refused coverage for chronic back injuries, the result of multiple beatings.”).

544. Cf. *Gibraltar Mutual Ins. Co. v. Hoosier Ins. Co.*, 486 N.E.2d 548, 553 (Ind. App. Ct. 1985) (asserting that the insurer aided and abetted a third party by circulating malicious and derogatory information to injure complainant’s business.).

545. See, e.g., Lyndsey Layton, *Cash-Strapped Metro Looks at Higher Fares*, WASH. POST, July 12, 2002, at B1. Metro’s insurance costs are expected to balloon in the next fiscal year. Property and general liability insurance is projected to increase by \$ 4 million annually, or 184 percent. Like other transit systems in the country, Metro also expects to lose its terrorism insurance. Metro now has a \$ 3 billion coverage plan, but its insurance provider will not renew the policy when it expires. *Id.*

nesses from private insurers to American taxpayers.<sup>546</sup> More amazing, the administration wants Congress to endorse this proposal even though liability insurers have already accumulated large reserves and made fairly substantial profits by selling insurance to high-risk individuals and businesses before September 11th.<sup>547</sup> For some, allowing insurers to abandon insurance consumers and forcing taxpayers to assume and bear the risks of terrorism simply amounts to more victimization.

There is more. Some observers of the liability-insurance industry assert that many insurance companies terrorize and re-victimize wounded insureds directly by refusing to compensate policy holders promptly after the latter have proved financial losses by refusing to settle claims when settlements are clearly appropriate, and by forcing traumatized victims to file expensive lawsuits to secure insurance proceeds. Still, others have asserted that insurers also aid and abet terrorists in ways that one would least expect—for example, by financing international, domestic and commercial terrorism.

This article has investigated the level of insurance companies' illegal participation in the transatlantic slave trade. And the findings are fairly conclusive. For purely economic reasons, American and English merchants, professionals and their agents effectively intimidated, enslaved, murdered and tortured millions of innocents for more than three centuries. Without doubt, both British and American insurers helped the perpetrators by financing, supporting and participating directly in that horrible and immoral enterprise.

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546. Jackie Spinner, *Terrorism Insurance Bill Passed By Senate: Battle Expected Over Competing Versions*, WASH. POST, Jun. 19, 2002, at E1 ("The Senate approved legislation that would provide insurance companies with billions of dollars in government funding to help pay claims from future terrorist strikes . . . President Bush [said] 'Terrorism insurance is critical to promoting and protecting jobs and America's economic security [.]'").

547. Compare Andrew Bary, *Follow-Up— Premium Insurer: Can Chubb Go Still Higher?* BARRON'S, Aug. 7, 2000, at 14 ("The long-depressed property/casualty insurance industry may finally be turning around . . . [S]everal companies stated in that premiums for many policies are up 10%-15% and some forms of reinsurance rates have risen 100%."), with Thomas G. Donlan, *Creating Reserves: Dealing With Inadequate National Supplies of Money and Blood*, BARRON'S, Nov. 19, 2001, at 43. 'Heads I win, tails you lose' has always been an unwritten part of the contract for property and casualty insurance. Then something 'unexpected' occurs, such as a terrorist attack in New York City. That drives premiums up. Insurers who were happy to charge low premiums when they weren't paying claims ('Heads I win') suddenly PERCEIVE THAT PREMIUMS WERE TOO LOW and they raise them all at once ('Tails you lose'). Robert E. Vagley, president of the American Insurance Association told the banking committee that reinsurers are likely to cut back or cancel their coverage of claims arising from terrorist attacks at the first opportunity. And for about two-thirds of property-casualty insurance in the United States, reinsurance is renewed annually. Reinsurers, most[ly] based in countries beyond the reach of U.S. regulators, may do as they please, or as they must to survive. (emphasis added) *Id.*

There is, however, a final and an even more compelling issue. To repeat, Attorney General Ashcroft proclaimed that the government would pursue and bring aiders and abettors of terrorism to justice. So we ask seriously: would the attorney general place some federal- and state-court judges on his list of aiders and abettors? Esteemed American and British judges helped traders and insurers terrorize and injure innocent persons during the triangular slave trade. For certain, insurers could have never assisted the slave traders so competently without the added protections and endorsements of American and British courts.

More incredible, some of the most celebrated and brightest English judges — Lord Justices Edward Coke, John Holt, William Murray (Lord Mansfield), William Blackstone, John Somers, Philip Yorke (Lord Hardwicke), and John Scott (Lord Eldon), to name a few— provided the assistance. These judges played prominent roles in the development of English common law and the law of equity. Therefore, it is painful to learn that they were much more concerned with protecting commercial terrorists' and insurance companies' property interests and contractual rights than stopping the terrors of the slave trade. Even more disheartening, those celebrated judges showed little, if any, compassion for the plight and the unimaginable suffering of the victims of commercial terrorism. Certainly, such judicial insensitivity should disturb all fair-minded and compassionate jurists and laypersons, especially those who claim that they abhor terrorism in all of its ugly forms. Perhaps, this should be the major story that evolves from this article.

Why must the present legal community be extremely alarmed about judges' highly objectionable, strained and, arguably, immoral rulings during the transatlantic slave trade? Again, if the projections are valid, all sorts of terrorist acts will increase in the United States in the not-too-distant future; both insured and third-party victims will expect insurance companies to cover the losses. However, evidence strongly suggests that insurers will simply ignore their contractual obligations and refuse to compensate victims of terrorism.

But more important, evidence also indicates that insurance companies will continue to aid and abet domestic terrorists wittingly or unwittingly; and affected individuals are likely to file an increasing number of lawsuits. Therefore, it is appropriate to ask: will American judges embrace settled legal and equitable principles and apply them consistently and fairly to achieve just results? Or will judges behave like English and American justices behaved during the transatlantic slave trade? Will judges carefully weigh the interests of terrorist victims when deciding whether to award declaratory and equitable relief to insurers? Or will courts just consider and protect the interests of insurance companies?

Unquestionably, members of the legal community and congressional members should not sit passively and quietly in the wake of September 11th and allow American judges to travel down the latter path. Arguably, if we acquiesce to state and federal judges' engaging in behavior reminiscent of their sixteenth-to-nineteen centuries brethrens' immorality and misconduct, then we become very much like those justices and insurance companies — aiders and abettors of terrorism.

